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No. _____

In The

# Supreme Court of the United States

ROSS PARKHURST and AMY PARKHURST, individually and as guardians and next friends of H.P., a minor child under the age of eighteen,

*Petitioners*,

v.

STEPHEN TABOR, DANIEL SHUE and COUNTY OF SEBASTIAN,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Do victims of incestuous sexual assault enjoy the right to equal protection of state law under the Equal Protection clause of the Fourteenth Amendment, including a right to the same kind of prosecution of their cases as would be accorded to victims of a sexual assault by a stranger? (*See, e.g., Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000), *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

2) Is the right to sue prosecutors for class-based discrimination under the Equal Protection clause of the Fourteenth Amendment held only by criminal defendants who are victims of such discrimination by law enforcement officers – or does the law follow the Second Circuit Court of Appeals (*Myers v. County of Orange*, 157 F.3d 66, 74-75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49), and the Ninth Circuit Court of Appeals (*Macias v. Ihde, supra*) which have granted standing to victims as well?

3) Do prosecutors enjoy a special exemption from suits by crime victims alleging class-based discrimination in violation of the Equal Protection clause – an exemption not found in case law and that does not apply to other law enforcement officials?

## PARTIES

Petitioners, ROSS PARKHURST, AMY PARKHURST and H.P., were plaintiffs in the district court proceedings and the appellants in the appellate proceedings before the Eighth Circuit Court of Appeals, Docket No. 08-2610. ROSS PARKHURST is the adoptive father, and AMY PARKHURST is the natural mother, of H.P., a child less than eighteen years of age, born May 8, 1994. Plaintiffs are and were domiciled in the State of Washington.

Respondents STEPHEN TABOR (hereafter "Tabor") and DANIEL SHUE (hereafter, "Shue") were defendants in the district court proceedings and appellees in the appellate proceedings before the Eighth Circuit Court of Appeals, Docket No. 08-2610. They were, respectively, Prosecuting Attorney and Chief Deputy Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas. Respondent COUNTY OF SEBASTIAN (hereafter "Sebastian County") is a body politic and governmental unit within the State of Arkansas.

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# PETITION FOR A WRIT OF CERTIORARI

## INTRODUCTION

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. H.P., a minor, alleges that she was brutally raped by her father, and that the criminal case against her assailant – though overwhelming – was abandoned by prosecutors specifically because they pursued a policy of avoiding prosecutions for incestuous rape as opposed to rapes committed by strangers. The dismissal of her suit against the prosecutors, and the county that directed them – on the grounds that she lacked standing to sue – was affirmed by the Eighth Circuit Court of Appeals. Thus, the court below denied H.P. the fundamental constitutional right to equal protection under state law. The Eighth Circuit's holding, if allowed to stand, would mean that even overt discrimination by prosecutors against a crime victim, because she belongs to a disfavored class, does not give the doubly-victimized individual any right to challenge that discrimination under the Equal Protection clause and 42 U.S.C. § 1983.

In so holding, the Eighth Circuit ignored relevant rulings of this Court, failed to apply well-established federal precedents, and deviated from the law as determined by the Second Circuit and Ninth Circuit Courts of Appeal, thus creating an untenable split between Circuits on a critical question of federal civil rights law.

The Eighth Circuit's arbitrary distinction between criminal defendants who suffer class-based discrimination by prosecutors – who unquestionably do have standing to sue for such equal protection violations – and crime *victims* injured by exactly the same discrimination – who, according to the Eighth Circuit, lack such standing – is wholly unsupported by case law and in fact contradicts a recent holding of the Second Circuit Court of Appeals. Moreover, the Eighth Circuit ignored a long line of federal cases that have explicitly conferred standing to sue law enforcement officers on crime victims whose cases, because of their membership in a disfavored class – for instance, female or minor victims of domestic violence – were not treated as they would have been had the victims not belonged to such a class. In addition, the Eighth Circuit broke with a recent precedent set by the Ninth Circuit Court of Appeals, in which that Court found class-based discrimination against a crime victim by law enforcement officers – exactly the wrong alleged in the instant matter – to be a legal injury sufficient to confer standing on the victim.

What is more, the Eighth Circuit embraced a novel – and dangerous – position that exempts prosecutors from the equal-protection constraints placed on all other law enforcement officers throughout twenty-five years' worth of federal civil rights decisions. This holding completely ignores existing case law. What is more, it would effectively vitiate a whole series of federal decisions requiring law enforcement officers to give equal treatment to members of all classes of crime victims, by enabling

prosecutors to abandon cases – on blatantly discriminatory grounds – which police officers and other law enforcement officers are required to pursue. In a word, it would sanction precisely the sort of class-based discrimination the federal courts have repeatedly proscribed; law enforcement officers could simply shift the burden of discrimination to prosecutors and go right back to dispensing the unequal justice the courts have worked so vigorously, for so long, to prevent.

These critically important issues of law require this Court's intervention.

## OPINIONS BELOW

The opinion of the court of appeals, Pet .App. 1a-12a, is reported at ___ F.3d ____, 2009 WL 1794691 (8th Cir. 2009). The district court's memorandum opinion, *id.* at 18a-32a, and accompanying order dismissing the case, *id.* at 33a-34a, are not reported.

## JURISDICTION

The court of appeals entered its judgment on June 25, 2009. On July 9, 2009, petitioners timely filed a motion for rehearing *en banc*, which motion was denied by the court of appeals by order dated August 6, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 37a-38a. They consist of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

## STATEMENT OF THE CASE

### A. The Facts

1. Plaintiff H.P. is a fifteen-year-old girl who, between the ages of seven and nine, was raped and sodomized on multiple occasions by her biological father, Chad Belt.[1] The assaults occurred during summer visitations in 2001 and 2003 in Arkansas after Belt and Ms. Parkhurst divorced.[2] (Pet. App. 3a-4a.)

2. H.P. was afraid at first to report what had been done to her, for fear of violent retaliation by Belt, who had threatened to hurt her family – including his young child by his current marriage –

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[1] The facts of this case are set forth in more detail in the court of appeal's opinion, Pet. App. 1a-12a. Because H.P.'s claims were dismissed pursuant to Fed. R. Civ. P. 12(b), the Court must assume the truth of the plaintiffs' allegations, which are summarized herein.

[2] As the result of H.P.'s claims against Belt for battery and outrage arising from these events, a federal jury awarded the plaintiffs $250,000 in compensatory damages and $750,000 in punitive damages against Belt in the district court proceedings. This judgment was affirmed by the court of appeals in a decision dated June 9, 2009.

if H.P. told anyone what he had done. In July 2003, H.P. called her mother to complain of vaginal bleeding. When Ms. Parkhurst took H.P. to receive medical attention, all medical personnel at three separate facilities (including one that specialized in forensic sexual assault examinations for children) concluded that H.P.'s injuries were indicative of a brutal sexual assault. (*Id.* 3a-4a.)

3. A few weeks after Belt learned of these medical conclusions, he *sua sponte* offered to give up his parental rights. After H.P. was adopted by plaintiff Ross Parkhurst (who had married H.P.'s mother when H.P. was six), and learned she would never have to visit Belt again, she disclosed that Belt was her attacker. (*Id.* 4a.)

4. Overwhelming evidence, including H.P.'s explicit statements, physical and medical evidence, psychological corroboration, and other corroborating facts amply supported the case against Belt. Following an investigation by local police, Belt was arrested on December 5, 2003 by Sebastian County police and charged with the felony sexual assault of H.P. in *State of Arkansas v. Chad Belt*, Case No. CR-2003-1277 (hereafter "the Belt Prosecution"). (*Id.* 4a-5a.)

5. Though aware of the overwhelming evidence of Belt's guilt, the prosecutors responsible for the case (hereafter, the "Prosecutors") sought excuses to abandon the Belt Prosecution because the sexual assaults in the case involved incest; such cases are politically unpopular and, as the Prosecutors

stated, "no one wants these [incest] cases." (*Id.* 4a-6a.)

6. In so doing, the Prosecutors followed a specific and deliberate policy – fashioned by them and by Sebastian County, which supervised and directed them – not to treat sexual assaults involving incest with the same rigor and seriousness they devoted to sexual assaults committed by a stranger to the victim. (*Id.* 5a-6a.)

7. Although they acknowledged in writing to H.P.'s family that they were "convinced that the event [H.P.'s rape by Belt] occurred" (*Id.* 6a), the Prosecutors abandoned the Belt Prosecution by means of a *nolle prosequi* on or about June 28, 2004, pursuant to respondents' policy of not seriously pursuing incest-related sexual assaults, as noted above. (*Id.* 5a-6a.)

8. Plaintiffs specifically alleged that the Belt Prosecution was knowingly abandoned by the Prosecutors solely because it was the practice and/or policy of Sebastian County, Arkansas prosecutors not to pursue incest cases as they would other cases of sexual assault. Accordingly, the Prosecutors were sued in their official as well as their individual capacities for violations of the Equal Protection clause of the Fourteenth Amendment. (*Id.* 5a-6a.)

**B. Proceedings Below**

1. Plaintiffs sought: a declaratory judgment stating that the defendants' discriminatory

enforcement of Arkansas' sexual assault statutes violates the Equal Protection clause; an injunction requiring the reinstatement of the Belt Prosecution; damages; and attorney's fees.

2. The U.S. District Court for the Western District of Arkansas dismissed plaintiffs' claims under Rule 12(b)(6), arguing that plaintiffs lacked standing to pursue an equal protection claim against prosecutors, or the county that directed them, because crime victims have no rights against prosecutors under the Equal Protection clause of the Fourteenth Amendment. (Pet. App. 24a-32a.) The Eighth Circuit Court of Appeals affirmed that decision.

3. The court of appeals conceded that "it is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim" (*Id.* 9a) and that "crime victims . . . have a right to challenge the allegedly discriminatory provision of police protection" by law enforcement officers (*Id.* 8a). However, the court of appeals argued that victims' well-recognized standing to sue law enforcement officers for discriminatory handling of their cases does not extend to prosecutors. The court of appeals completely ignored recent authority from the Second Circuit Court of Appeals that conferred standing on a victim to challenge prosecutorial policies – just as in the instant case – on equal protection grounds.

4. The court of appeals also argued that prosecutors are not subject to equal protection suits

by crime victims because they are exempt from the requirements of the Equal Protection clause that bind all other law enforcement officers. The court opined: "While police officers are under a 'statutorily imposed duty to enforce the law equally and fairly' [citation omitted]," the same obligation of the Fourteenth Amendment does not rest on prosecutors, since "whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor's discretion." (*Id.* 12a.) In so holding, the court of appeals ignored a precedent of this Court – which does apply the requirements of the Equal Protection clause to decisions whether or not to prosecute – and the court of appeals cited no authority whatever for the contention that prosecutors enjoy an exemption from the Equal Protection clause that does not apply to other law enforcement officers.

5. Petitioners filed a timely motion for rehearing *en banc*, which was denied by order of the court of appeals dated August 6, 2009. (*Id.* 35a-36a.)

## REASONS FOR GRANTING THE WRIT

### I. The Eighth Circuit's Decision Denying Plaintiffs Standing Is Contrary to Precedents of this Court and Well-Established Case Law, and Creates a Conflict Among the Circuits on an Important Question of Federal Law

The intervention of this Court to review the Eighth Circuit's decision is essential for several

reasons. First, the court of appeals' insistence that a prosecutors' decision to abandon a criminal case can never be subject to the constraints of the Equal Protection clause contravenes holdings of this Court. It also ignores well-established case law demonstrating that crime victims do have standing to challenge class-based discrimination against them by law enforcement officers. Moreover, the Eighth Circuit's belief that standing to pursue equal protection claims against state law enforcement officers – specifically, prosecutors – exists only in criminal *defendants*, and is not shared by crime *victims*, contradicts recent authority from the Second and Ninth Circuit Courts of Appeal. In addition, the court of appeals rested its holding largely upon a wholly artificial distinction between prosecutors and other law enforcement officers – insisting that the former are not required "to enforce the laws equally and fairly" -- a position without the slightest basis in the relevant case law and contradicting a holding of this Court.

Besides all this, the court of appeals' holding would effectively eviscerate the extensive federal case law – stretching back twenty-five years – that guarantees crime victims the right to nondiscriminatory handling of their cases by police and similar law enforcement officers. The Eighth Circuit's novel ruling would nullify all of those precedents, by enabling law enforcement entities that wish to discriminate against whole classes of crime victims to do so with impunity; from now on, they could simply shift the discrimination – against minorities, against women, or (as in this case)

against victims of incest – from the police precinct to the prosecutor's office. Such a shift would legitimize a whole new era of law-enforcement discrimination against disfavored classes and set back the hard-won gains of minority and female victims a quarter of a century. Thus, the Eighth Circuit's holding in this case not only ignores a precedent of this Court and creates a split between Circuits, but threatens a crucial aspect of equal-protection civil rights law.

### A. Precedents of this Court Contradict the Eighth Circuit's Holding that a Prosecutor's Decision Not To Prosecute a Case, for Discriminatory Reasons, is Not Governed by the Equal Protection Clause

Plaintiffs' claims against respondents arose from the abandonment of the Belt Prosecution due solely to respondents' discriminatory policy, one that treated H.P., as a minor victim of an incestuous assault, as a member of a disfavored class of crime victims.

The Eighth Circuit acknowledged that crime victims have standing to sue law enforcement officers who fail to pursue those victims' assailants due to class-based discrimination. (Pet. App. 11a.) Indeed, the court of appeals had little choice but to concede this, since a long line of federal cases explicitly grants standing, under the Equal Protection clause, to such crime victims to sue the law enforcement officers who subjected their cases to discriminatory treatment. *Estate of Macias v.*

*Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *Navarro v. Block*, 72 F.3d 712, 715-17 (9th Cir. 1995); *Myers v. County of Orange*, 157 F.3d 66, 74-75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49; *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984). The import of these decisions – and, indeed, their clear language – requires the same result regardless of the specific kind of state law enforcement officer being sued. For instance, in upholding the standing of women and children, who were victims of domestic violence, to sue law enforcement officers who allegedly treated their cases less seriously than similar assaults between strangers, *Thurman v. City of Torrington* – the progenitor of this entire line of cases – articulated its holding in terms that unmistakably applied to *all* law enforcement officers, regardless of type or title:

> [T]he plaintiffs alleged that there is an administrative classification used . . . to implement the law in a discriminatory fashion. *It is well settled that the equal protection clause is applicable . . . to discriminatory governmental action in administration and enforcement of the law.*

595 F. Supp. at 1527-28 [emphasis added]. The court of appeals attempted to duck the application of this "well settled" principle to the instant claims by insisting that prosecutors, unlike other law enforcement officers, are not "under a 'statutorily imposed duty to enforce the laws equally and fairly.'" (Pet. App. 12a.) Amazingly, the court of appeals suggested that it found this distinction in

*Thurman v. City of Torrington* – a holding that, as just shown, unequivocally rejects it.

Indeed, the court of appeals' novel theory is not only unsupported by any case law (including the case law it cites). It actually contradicts precedents of this Court, which has made it plain that the decision of whether to prosecute a criminal case – precisely the law enforcement decision at the heart of this case – is, in fact, "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct. 2198, 2204-05, 60 L. Ed. 2d 755, 765 (1979). Further, this Court has more than once emphasized that one of those "constitutional constraints" on the decision to prosecute involves equal protection of the laws – precisely the issue raised in the instant case: "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, *or other arbitrary classification*.'" *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687, 698 (1996), *quoting Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 506, 7 L. Ed. 2d 446, 452-53 (1962) [emphasis added].

With these holdings, this Court flatly refuted the court of appeals' position – that a charging decision by prosecutors is exempt from equal protection constraints based on discrimination against a crime victim's class – long before the court of appeals wrote it.

What is more, this Court has specifically insisted that prosecutors *do* have a duty to enforce the laws fairly – exactly the "duty" the Eighth

Circuit's decision arbitrarily limited to police officers. Whatever "latitude" prosecutors may enjoy in determining which cases to prosecute, ruled this Court over ten years ago, is entrusted to prosecutors only because "they are designated . . . to 'take care that the laws be faithfully executed.'" *United States v. Armstrong*, *supra*, 517 U.S. at 464, 116 S. Ct. 1486. Not surprisingly, the Eighth Circuit fails to mention this precedent.

In a word, the court of appeals erred gravely in insisting that prosecutors' charging decisions are not bound by the Equal Protection clause. This Court has maintained the exact opposite, placing the same constitutional constraints upon prosecutors as on all law enforcement officers – a point completely ignored by the court of appeals.

This fact is of critical significance, for with the removal of this legal error the court of appeals' reasoning collapses. Once it is conceded that, with respect to victims' rights under the Equal Protection clause, prosecutors' charging decisions are on a par with the decisions of other law enforcement officers whether or not to pursue a criminal case, it follows that the holdings of *Macias*, *Navarro*, *Myers* and *Thurman* control the instant case. The ineluctable conclusion is that H.P., as a crime victim subjected to class-based discrimination by state law enforcement officers, has standing to sue respondents, just as she would if they were detectives, sheriffs, patrolmen or any other law enforcement officer – and the court of appeals' holding is clearly in error.

The court of appeals attempted to escape this conclusion by contradicting Supreme Court authority on a crucially important question of civil rights law. Such an approach cannot stand.

### B. Well-Established Case Law Clearly Grants Standing to Crime Victims To Sue Law Enforcement Officers for Violations of the Equal Protection Clause, Precedents That Were Ignored by the Eighth Circuit

The court of appeals' decision denies that minor victims of incestuous sexual assault enjoy the right to equal protection of state law – specifically, the right to the same treatment of their case by prosecutors as would be accorded to victims of a sexual assault by a stranger. In so ruling, the court of appeals failed to apply the relevant precedents and misinterpreted the cases on which it purported to rely.

#### 1. Crime Victims Have Standing To Sue All Law Enforcement Officers for Class-Based Discrimination

The court of appeals' opinion concedes the existence of "several cases where crime victims were determined to have a right to challenge the allegedly discriminatory provision of police protection." (Pet. App. 11a.) Review of those cases reveals beyond doubt that the right of such crime victims to demand equal protection from state law enforcement officers does not turn on whether the law enforcement officers being sued are police

officers; rather, the case law indicates that *all* law enforcement officers are subject to the constraints of the Equal Protection clause in meting out equal justice to all classes of crime victims. The court of appeals simply ignored these precedents.

For example, as noted above, the court of appeals acknowledged the crucial precedent of *Thurman v. City of Torrington*, *supra*, *citing Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 2d 220 (1886), *Britton v. Rogers*, 631 F.2d 572, 577 (8th Cir. 1980), *cert. denied*, 451 U.S. 939, 101 S. Ct. 2021, 68 L. Ed. 2d 327 (1981) and *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F. Supp. 400, 409 (1980), *order rev'd on other grounds*, 639 F.2d 373 (7th Cir. 1981), *judgment rev'd on other grounds*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362, *rehearing denied*, 456 U.S. 950, 102 S. Ct. 2023, 72 L. Ed. 2d 476 (1982). The court of appeals simply failed to apply it.

The *Thurman* court, resting its conclusion on precedents of this Court and federal appellate court decisions, recognized the standing of a crime victim to sue state officers for discriminatory enforcement of the criminal laws in terms as broad as they were clear: "the equal protection clause is applicable . . . to discriminatory governmental action in administration and enforcement of the law." 595 F. Supp. at 1527-28. In that case, the plaintiffs alleged that law enforcement officers had slighted their complaints of assault because the crimes at issue involved domestic abuse, as opposed to assaults by strangers. In upholding these plaintiffs' standing to sue under the Equal Protection clause, the

*Thurman* court's language rejected the Eighth Circuit's arbitrary distinction between police (who, as even the Eighth Circuit concedes, may be sued by crime victims for discriminatory treatment) and prosecutors (who, according to the Eighth Circuit, may not be). No such distinction can possibly be read into *Thurman's* recognition of victims' standing to challenge *any* "discriminatory governmental action in administration and enforcement of the law."

Nor has this law changed. Sixteen years later, precisely the same conclusion was reached in *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000). That recent appellate holding, like *Thurman*, explicitly recognized the standing of crime victims to sue law enforcement officials for class-based discrimination. The plaintiff in *Estate of Macias* represented a victim of stalking and murder, alleging that the law enforcement officers involved in her case had ignored her complaints merely because of her membership in a disfavored class. (She was a Latino woman as well as a victim of domestic abuse.) Nothing whatsoever in this recent holding of the Ninth Circuit supports the drawing of any distinction between prosecutors and other law enforcement officers as the targets of an equal-protection claim. Not even the court of appeals in the instant case has claimed otherwise.

In fact, in *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49), the Second Circuit Court of Appeals emphatically rejected any distinction between prosecutors and other law

enforcement officers (in equal protection suits by victims) by upholding an alleged crime victim's standing to pursue a claim that challenged an equal protection violation wrought by a *prosecutorial policy*. In that case, the plaintiff alleged that the policy of prosecutors (and the county that directed them) to pursue criminal complaints in the order received violated his right to equal protection, because his own criminal complaint – against the man who accused *him* – was given short shrift by prosecutors. The Second Circuit upheld his standing to pursue this claim, demonstrating beyond any question that the principles articulated in *Thurman* and *Macias* are not limited to police officers but comprehend prosecutorial decisions as well. Yet, again, the court of appeals ignored this precedent. (The *Myers* case is not even mentioned in the lower court's decision.)

Remarkably, in rendering an opinion on such a critical question, the court of appeals even disregarded its own prior holding in an earlier case. Less than twenty years ago the Eighth Circuit itself articulated exactly the same principle vindicated in *Macias*, *Myers* and *Thurman*, holding that "the state may not 'selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.'" *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990), *quoting DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197, 109 S. Ct. 998, 1004 n. 3, 103 L. Ed. 2d 249, 259 (1989). Once again, this language exactly describes the issue in the case at bar, in which H.P. accuses state

prosecutors of withholding their protection from her due to her status among a disfavored minority; once again, the holding (that such a victim of discriminatory law enforcement may sue the state officials responsible) is clearly relevant to all state law enforcement officers, regardless of what "protective service" they offer; and once again, the court of appeals simply ignored the relevant precedent.

The Eight Circuit's decision is thus completely unsupported by case law, a fact that requires review by this Court. (The lower court's holding also sets it at odds with the Second and Ninth Circuits, creating an untenable inconsistency in a critical question of federal civil rights law – an issue discussed more fully at subsection (C) below.)

**2. A Suit Alleging an Equal Protection Violation by Prosecutors Is Not a Suit Merely Alleging a Failure To Prosecute, an Issue Overlooked by the Court of Appeals and Critical to Civil Rights Law**

As shown above, case law stretching back twenty-five years supports petitioners' assertion of standing in this case. The court of appeals, however, purported to find in a handful of irrelevant cases an exemption for prosecutors from the well-established rule that law enforcement officials are answerable to crime victims under the Equal Protection clause when they discriminate, in the treatment of the criminal case, against a class to which the victim belongs. The court of appeals'

reasoning is fatally flawed by its failure to distinguish a case merely alleging a failure to enforce the law – which is not actionable by a victim – and a suit, like the instant matter, alleging failure to prosecute ***as the result of class-based discrimination***. That distinction is decisive.

The court of appeals' opinion cites *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) for the proposition that the right "to bring an equal protection claim . . . has not been extended to crime victims." (Pet. App. 9a.) The court of appeals is mistaken; the Supreme Court's holding in that case had nothing whatsoever to do with the prosecutorial discrimination at issue in the case at bar. *Linda R.S.* held that a private citizen lacks standing *merely to demand the prosecution of another person. Id.*, 410 U.S. at 619, 93 S. Ct. at 1149, 35 L. Ed. 2d at 541-42. In fact, the Court explained clearly in that case that *no equal protection issue was before it*; the prosecutor (who was a defendant) had simply followed the applicable law, and any alleged discrimination was built into a state statute – an issue that was ***not*** addressed in the Court's holding:

> [In the] District Court . . . Petitioner argued that the statute [applied by the defendant prosecutor] violated equal protection . . . However, the three-judge court held that *the challenge to this statute was not properly before it*, since appellant did not seek an injunction running against any state official as to it. . . . The Court therefore remanded this portion of the case to a single district

> judge. . . . ***The District Court's disposition of [this] claim is not presently before us.*** (410 U.S. at 615, 616, n. 1 [emphasis added].)

In other words, *Linda R.S.* shows only that, in the absence of discrimination, a crime victim may not sue a prosecutor for not prosecuting her assailant.

Such a holding is remote from the facts of the case at bar. When a crime victim seeks, not specifically to compel the enforcement of the criminal law on her behalf, but ***to challenge law enforcement officials' discrimination against a class of individuals to which the crime victim belongs***, such a victim does have standing to sue a law enforcement officer for that equal protection violation. *Thurman*, 595 F. Supp. at 1527-28. That is precisely the nature of H.P.'s claim. Respondents in this case have never suggested – nor can they – that the criminal statute involved in this case requires prosecutors to ignore rapes when they are committed by close relatives. Thus, *Linda R.S.* is simply of no relevance whatsoever to the instant claims.

Equally irrelevant, and for the same reason, are the few other cases the court of appeals cites. (Pet. App. 10a-11a.) The court of appeals correctly summarizes the holding of *Doe v. Mayor and City Council of Pocomoke City*, 745 F. Supp. 1137, 1139 (D. Md. 1990) as a denial of any "right that a private citizen has to require a public official to investigate or prosecute a crime." H.P. does not demand any such "right"; her claims arise from the discriminatory handling of her case due to her

membership in a disfavored class. That is a claim of an entirely different (and superior) legal character.

Similarly, neither *United States v. United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) nor *United States v. Grundhoefer*, 916 F.2d 788, 791 (2nd Cir. 1990) involved a claim of class-based discrimination; those holdings merely repeat that of *Linda R.S.* that private citizens cannot control prosecutors nor demand prosecution *per se*. In *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) – the one remaining case cited by the court of appeals – the plaintiff, though a crime victim, did not allege that he belonged to a disfavored class, nor that the state's failure to prosecute was part of a pattern or policy of discrimination against people situated like himself – which is the crux of H.P.'s claims. In a word, not one of these cases even touches upon the issue posed in this case.

In fact, the irrelevance of these cases is underscored in a case the court of appeals does cite. The Ninth Circuit, in *Estate of Macias*, *supra*, went out of its way to stress the difference between attempting to compel law enforcement officers to pursue a case – for which a crime victim lacks standing – and bringing an action under the Equal Protection for a failure of law enforcement *due to class-based discrimination against the victim*, as in the instant case. The *Macias* court, in its decision, specifically reminded the parties that "there is no constitutional right to be protected by the state" (219 F.3d at 1028) – and thus that crime victims may not ordinarily sue law enforcement officers for failing to enforce the law. But in reversing the

dismissal of the plaintiff's claims (for an alleged lack of standing), *the same court* affirmed that crime victims *do* have standing against law enforcement officials who violate the Equal Protection clause by ignoring cases affecting particular classes of victims: "There *is* a constitutional right . . . to have police services administered *in a nondiscriminatory manner – **a right that is violated when a state actor denies such protection to disfavored persons.**" Id.* [emphasis added.]

In short, the Eighth Circuit simply asked and answered the wrong question in this case. H.P., in seeking justice for the rape she suffered, is not alleging that law enforcement officials in her case simply failed to pursue her assailant. She asserts that the law enforcement defendants deliberately abandoned her case *because of class-based discrimination against victims of her kind*, that is, victims of incest. The court of appeals rationale for denying H.P. her day in court rests entirely on a fiction – one that undermines twenty-five years' worth of hard-won civil rights law on behalf of women and children. This should not stand.

### 3. The Court of Appeals' Holding Would Permit Prosecutors To Discriminate against a Class of Crime Victims in Precisely the Manner in which Other State Actors Are Forbidden To Act

As shown above, the court of appeals misunderstood and misapplied the relevant precedents on a critical question of federal civil

rights law. Still worse, the effect of the court of appeals' decision would be to legitimise a species of law-enforcement discrimination that has been repeatedly and emphatically rejected by this Court and many others.

It is beyond question that a state cannot, for instance, enact a statute making rape a crime if committed against some women, but not against others, without violating the Equal Protection clause. This Court has emphatically ruled out any such possibility. *See Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S. Ct. 1029, 1035, 31 L. Ed. 2d 349 (1972). It is just as obvious that law enforcement officials cannot, by a policy of selective enforcement, constitutionally accomplish the same illegal result – applying the rape laws to protect one class of victims, but not another. Indeed, federal appellate courts have already reached similar conclusions. *See Estate of Macias v. Ihde, supra*, 219 F.3d at 1028.

Yet if the reasoning of the court of appeals were accepted, prosecutors would be permitted to do precisely what is forbidden to legislators and law enforcement officers generally: prosecutors (and only they) could selectively enforce rape laws so that some victims are afforded less protection under the law than victims who belong to a more favored class. There is no authority of any kind consistent with such a result. Just the opposite: for decades, courts all over the country, in the name of equal protection, have uniformly ***rejected*** the discriminatory application of sexual assault statutes to attacks on arbitrarily divided classes of

victims – exactly the result ***upheld*** by the Eighth Circuit in this case. Thus, for example, New York's highest court ruled in *People v. Liberta*, 64 N.Y.2d 152, 473 N.Y.S.2d 636, 474 N.E.2d 567 (1984), *cert. denied*, 471 U.S. 1020, 105 S. Ct. 2029, 85 L. Ed. 2d 310, that the "spousal exemption" (imposing a lesser penalty on an offender for the rape of his wife) violated equal protection because it arbitrarily treated one class of rape victims differently from another.[3] For such discrimination to be constitutional, the court stated, "the classification must be reasonable and must be based upon 'some ground of difference that rationally explains the different treatment.'" 474 N.E.2d at 573-75, *quoting Eisenstadt v. Baird*, *supra*, 405 U.S. at 447, 92 S. Ct. at 1035, 31 L. Ed. 2d 349 (1972). The same conclusion was reached by the Illinois courts in *People v. M.D.*, 231 Ill. App. 3d 176, 595 N.E.2d 702, 713 (Ill. App. 2nd Dist., 1992), *cert. denied*, 603 N.E.2d 467 (marital exemption in sexual assault statute violated the Equal Protection clause), and in Alabama in *Williams v. State*, 494 So. 2d 819, 826-828 (Ala. Crim. App., 1986), *rehearing and cert. denied* (marital exemption in forcible sodomy statute violated equal protection principles).

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[3] Besides being sustained by the U.S. Supreme Court, this holding – that a discriminatory governmental policy toward different "classes" of rape victims is at odds with the Equal Protection clause – has been cited with approval by a federal appellate court in *Doyle v. Suffolk County*, 786 F.2d 523, 527 (2nd Cir. 1986). The undersigned have not located a single federal case disputing this conclusion, of obvious relevance to the case at bar.

The Eighth Circuit itself has held, likewise, that statutes that are not gender neutral may be upheld *only* "if the classification serves important governmental interests and the means used are substantially related to achieving those interests." *United States v. Davis*, 785 F.2d 610, 614 (8th Cir. 1986). Surely no one will argue that failing to prosecute rapes of children by close relatives (as opposed to other rapes) serves any "important governmental interests," or involves a "rational ground of difference" between incestuous rapes and other sexual assaults. Yet, if the Eighth Circuit's approach to the instant case were allowed to stand, prosecutors would be free to accomplish, through an arbitrary policy, exactly the same discriminatory result that – even according to a prior holding of the Eighth Circuit – violates the Equal Protection clause if embodied in a properly-enacted statute!

The consequences of such a holding would be devastating to the civil rights standards that currently govern state law enforcement. As shown above, it would mean that the same equal protection standards that control state legislatures, and all other state law enforcement officers, are powerless over prosecutors. It would mean that prosecutors would become the one and only species of state actor who are above the requirements of the Equal Protection clause, even when their conduct includes overt discrimination against a crime victim based on his or her membership in a disfavored class. According to the court of appeals, prosecutors may refuse to prosecute a crime committed against a victim because of that victim's

race, religion, gender – or, as in this case, her status as a victim of incest.[4]

### C. The Eighth Circuit's Holding in this Case Contradicts Recent Holdings of the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals

The court of appeals attempted to rationalize its novel theory – one that grants prosecutors an exemption, unique among state actors, to discriminate against classes of victims – by staking out a position that contradicts holdings of the Second and Ninth Circuit Courts of Appeals. Accordingly, the Eighth Circuit's holding in this case results in a split among the Circuits, requiring this Court's intervention to clarify and standardize the applicable law.

Apparently uncomfortable with the special immunity from the Equal Protection clause it had fashioned for prosecutors, the court of appeals abruptly conceded that prosecutors may, in fact, be sued for class-based discrimination – but only by *criminal defendants* who are victims of such discrimination. ("[I]t is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim.") The court of appeals insisted,

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[4] For instance, under the court of appeals' reasoning, it would be permissible for a county within the Eighth Circuit to enact an overt policy according to which certain victims – such as Caucasian rape victims – would have their cases prosecuted, while non-Caucasian victims' cases would be ignored.

however, that prosecutors may not be sued by crime *victims* for exactly the same sort of discrimination. (Pet. App. 9a-11a.)

In so ruling, the court of appeals jumped from the proverbial frying pan into the fire, for this rationale is not only unsupported by case law; it actually defies precedents of other courts of appeal. Thus, the court of appeals' decision creates a split among the Circuits on an important question of federal law, a fact that alone suffices to require this Court's review.

Amazingly, the court of appeals failed even to mention the most direct of the out-of-circuit precedents from which it departed. In *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49),[5] the Second Circuit Court of Appeals specifically upheld a plaintiff's standing to sue for damages under the Equal Protection clause arising from a prosecutorial policy that violated his equal protection rights – as an alleged *victim* of a criminal assault. 157 F.3d at 74-75. The Second Circuit's holding is thus directly contrary to the Eighth Circuit's ruling in the instant case.

In *Myers*, the plaintiff alleged that he had been attacked by another man and his son as he drove his car. He called the police to report the attack;

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[5] *Myers* was briefed to the court of appeals and was specifically addressed by both sides during oral argument; inexplicably, the court of appeals' decision does not once refer to it.

however, unknown to him, the other man had already called to make a complaint against *him*. The police refused to listen to his complaints and never prosecuted the plaintiff's alleged assailants. The plaintiff then brought an equal protection action against the county that directed the local prosecutors, alleging that the county had promulgated a prosecutorial policy that dealt with criminal complaints on a first-come, first-served basis. He argued that this policy had caused his legitimate complaint to be ignored, with the result that his assailants were never prosecuted (though he himself was, unsuccessfully).

The Second Circuit Court of Appeals, in upholding this victim's standing to challenge a prosecutorial policy under the Equal Protection clause, thus staked out a position directly opposed to that now taken by the Eighth Circuit, which insists that only a criminal defendant has standing to sue a prosecutor for class-based discrimination in a prosecutor's charging decisions. This means a split between the circuits – making this a question of extraordinary importance for this Court.

Moreover, the Eighth Circuit's holding in the instant case runs afoul of the Ninth Circuit's repeated holding (in *Estate of Macias*, *supra* and *Navarro v. Block*, *supra*) that – following the clear language of *Thurman* and its progeny – crime victims have standing to sue law enforcement officers who fail to pursue their cases because of the victims' membership in a disfavored class. If the Eighth Circuit's reasoning be granted, denying crime victims an actionable legal interest in

discrimination by prosecutors, it must surely follow that such victims lack standing to challenge discrimination by any other law enforcement officers as well. How does a police officer's discriminatory decision not to arrest an alleged assailant cause the victim a greater legal injury than a prosecutor's discriminatory refusal to charge the same man? (The *Macias* court was careful to stress – following precedents of this Court – that the legal injury to the plaintiff in that case was the discrimination she suffered from the police officers' class-based decision not to pursue her claims, and not the subsequent assault that killed her. 219 F.3d at 1028; *see also Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586, 597 (1993) ("[t]he 'injury in fact' in an equal protection case . . . is the denial of equal treatment"); *Turner v. Fouche*, 396 U.S. 346, 362, 90 S. Ct. 532, 541, 24 L. Ed. 2d 567, 579-80 (1970).) The answer is ineluctable: the Eighth Circuit's denial of standing to crime victims to sue *some* law enforcement officers for class-based discrimination would logically deny standing to crime victims to sue *any* law enforcement officers. This places the Eighth and Ninth Circuits on opposite sides of a crucial question of civil rights law.

These splits between Circuits require the intervention of this Court. A critical question of the standing of crime victims to invoke the Equal Protection clause against law enforcement officers has received diametrically opposed answers from the Second and Ninth Circuits, on the one hand,

and from the Eight Circuit on the other. This Court must clarify and resolve the outstanding legal question.

## II. The Eighth Circuit's Novel Holding that Prosecutors May Ignore the Equal Protection Constraints that Apply to Other Law Enforcement Officers Would Effectively Nullify Decisions Of Other Circuits that Guarantee Crime Victims the Right to the Nondiscriminatory Handling of their Cases by Law Enforcement Officers

As shown above, the crux of the court of appeals' reasoning in this case is its denial that prosecutors fall under the same equal-protection constraints as other law enforcement officials. This is not only incorrect and violative of existing legal precedent; it would also effectively nullify all previous federal court decisions that have guaranteed crime victims the right to the nondiscriminatory handling of their cases by law enforcement officials.

First, that prosecutors are law enforcement officials – indeed, an integral part of the state's "police power," all of which exist for the purpose of enforcing state law – is well established by the relevant case law. *See In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997), *as amended on denial of rehearing, cert. denied*, 118 S. Ct. 2367, 141 L. Ed. 2d 736; *Hillis Motors, Inc. v. Hawaii Auto. Dealers Assn.*, 997 F.2d 581, 591 (9th Cir. 1993), *citing In re Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d

768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162, 102 S. Ct. 1035, 71 L. Ed. 2d 318. Logically, therefore, prosecutors must be bound by the same Constitutional constraints that govern other law enforcement officers – including the Equal Protection clause.[6]

Second, if the court of appeals' decision were accepted, even the equal protection rights apparently conceded in that decision would quickly break down. The court of appeals, after all, does cite approvingly the case law approved in three separate Circuits (the Second, the Ninth and the Sixth[7]) upholding the standing of crime victims to

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[6] The special doctrine of prosecutorial immunity, which sometimes gives prosecutors in their personal capacities immunity from suit arising from actions taken during their prosecution of a case, is not even discussed in the court of appeals' decision. Nor could it have been; even defendants tacitly conceded that this narrow common-law doctrine could not possibly justify the dismissal of plaintiffs' claims in the instant matter. *See also Shmueli v. City of New York*, 424 F.3d 231, 239 (2nd Cir. 2005); *accord, Roe v. City & County of San Francisco*, 109 F.3d 578, 586 (9th Cir. 1997) (there is no prosecutorial immunity from "suits for prospective injunctive relief"); *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1051 n. 1 (5th Cir. 1997) (same); *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985) (prosecutorial immunity does not shield official-capacity actions); *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) (counties may not assert prosecutorial immunity); *Wyatt v. Cole*, 504 U.S 158, 164, 112 S. Ct. 1827, 1831, 118 L. Ed. 2d 504 (1992) (prosecutorial immunity may not be used to undermine the civil-rights protections of 42 U.S. § 1983).

[7] *Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973), was cited in *Thurman v. City of Torrington, supra* and referred to in the court of appeals' decision.

sue police officers for class-based discrimination against them (Pet App. 11a-12a); the court of appeals even stresses that "police officers are under a 'statutorily imposed duty to enforce the laws equally and fairly.'" (Pet. App. 11a.)

But that "duty" would erode to nothing if police officers could effectively discriminate against any class of crime victims they choose, simply by "passing the buck," that is, shifting the discriminatory policy over to prosecutors – the next rung of the law enforcement apparatus. What comfort would it be to the domestic violence victims in *Thurman*, whose standing was upheld to make civil rights complaints against police who refused to treat their claims fairly, to learn that prosecutors are now permitted to discriminate against the very same class of victims, and for the very same reason? Were the court of appeals' decision to endure, their case would stand merely for the proposition that law enforcement officers who want to discriminate against certain classes of crime victims – however blatantly – need only pass an unwanted case along to prosecutors, who may dispose of it with impunity. Surely twenty-five years of civil rights guarantees for disfavored victims emanating from federal courts across the country cannot be so cavalierly dismissed.

Yet, given the language of the Eighth Circuit's novel holding, denying standing to crime victims to sue law enforcement officials who violate their right to equal protection, this is precisely what will result unless this Court grants certiorari to review this matter.

## CONCLUSION

The Eighth Circuit's decision in this case contravenes precedents of this Court and ignores twenty-five years of federal civil rights law, since *Thurman v. City of Torrington*, protecting crime victims from class-based discrimination by law enforcement officers. It effectively splits the Eighth Circuit from the Second and Ninth Circuits on a critical question of federal civil rights law (the standing of crime victims to sue law enforcement officers for class-based discrimination). What is more, it would, if accepted, undermine that entire hard-won tradition of equal protection and leave disfavored classes of victims with no effective recourse against discrimination by police, or by anyone else involved in the administration of the criminal law.

The court of appeals' holding clearly requires review by this Court. At the very least, the split between Circuits it causes requires resolution at the Supreme Court level. In addition, because the court of appeals' ruling in this case overlooks and deviates from the relevant law, undermines well-established civil rights principles, and contravenes Supreme Court authority, this case cries out for this Court's review.

H.P.'s right to face her assailant in a criminal court should not be denied because she is a minor victim of sexual assault by a close relative – because, as defendant Prosecutors told her family, "No one wants these cases." (Pet. App. 5a.) Just as the victims of domestic violence in *Thurman v. City*

*of Torrington*, whose complaints were ignored by police officers, needed the federal courts to vindicate their right to equal enforcement of the law, H.P. and other victims of incest need the federal courts to reaffirm the right of all crime victims to be treated equally by state law enforcement officials. The Eighth Circuit Court of Appeals did the exact opposite; its ruling would effectively eviscerate the whole line of cases since *Thurman* guaranteeing disfavored victims the right of equal protection in the enforcement of criminal laws. Petitioners respectfully request the intervention of this Court to protect the existing tradition of equal protection for crime victims.

Respectfully submitted,

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## APPENDIX A

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

**No. 08-2610**

**[Filed June 25, 2009]**

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|---|---|
| Ross Parkhurst, individually and as guardian and next friend of H. P.; Amy Parkhurst, individually and as guardian and next friend of H. P.; H. P., a minor child under the age of eighteen, | ) |
| Plaintiffs - Appellants, | ) |
| v. | ) |
| Stephen Tabor, individually and in his official capacity as Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; Daniel Shue, individually and in his official capacity as Chief Deputy Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; County of Sebastian, a body corporate and politic in the State of Arkansas, | ) |

Defendants - Appellees. )
)

Appeal from the United States
District Court for the
Western District of Arkansas.

Submitted: May 13, 2009
Filed: June 25, 2009

Before WOLLMAN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Ross and Amy Parkhurst, the adoptive father and biological mother of H.P., a minor child, asserted claims as next friend under 42 U.S.C. § 1983 against Arkansas state prosecutors Stephen Tabor and Daniel Shue, and Sebastian County, Arkansas. The Parkhursts alleged a violation of H.P.'s right to equal protection under the Fourteenth Amendment based on Tabor and Shue's decision to issue a nolle prosequi[1] and forego prosecution of H.P.'s biological father for the felony sexual assault of his daughter. The district court[2]

[1] A legal notice that a lawsuit has been abandoned. Black's Law Dictionary 1070 (7th ed. 1999).

[2] The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

dismissed the case under Rule 12(b)(6) for failure to state a claim. The Parkhursts appeal, arguing that the Fourteenth Amendment guarantees to crime victims the nondiscriminatory prosecution of crime. We affirm.

I.

When a district court dismisses a claim under Rule 12(b)(6) we examine the facts alleged in the complaint. See Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996). Amy Parkhurst and Chad Belt married in Arkansas in 1993, and their daughter H.P. was born in 1994. When the couple divorced in 2000, Amy Parkhurst was awarded sole custody while Belt was granted visitation rights. Shortly thereafter Amy Parkhurst relocated to Arizona with H.P. and married Ross Parkhurst.

H.P. first visited Belt in Arkansas for an extended period of time during the summer of 2001 when she was seven. After returning to Arizona H.P. begged her mother not to require her to visit her biological father again. When Belt arrived in Arizona the following summer to take H.P. back to Arkansas, she became emotionally overwrought and was allowed to skip the visit. Belt insisted that H.P. resume visitation in 2003, however, and H.P. spent seven weeks in Arkansas with him when she was nine. Amy Parkhurst spoke regularly to H.P. that summer and reported that her daughter seemed increasingly uncomfortable and emotional as the summer progressed.

On July 21, 2003 H.P. telephoned her mother from Arkansas and informed her that she had injured her genitals in a diving board accident and was bleeding vaginally. Two days later Amy Parkhurst traveled to Arkansas to investigate the nature of H.P.'s injuries and to procure medical treatment for her daughter since Belt had not. Upon Amy Parkhurst's arrival, H.P. informed her that she had injured both her "bottom" and her vagina. Between July 23 and 28 H.P. was examined at three separate medical facilities in Arkansas and Oklahoma. Although H.P. continued to insist that she had been injured in an inconsistently described accident, all medical personnel diagnosed H.P. as a potential victim of sexual abuse. The matter was referred to the Crimes Against Children Division of the Arkansas State Police which determined that H.P. had been sexually abused but noted that she feared identifying the perpetrator.

Shortly after H.P. and her mother left Arkansas for Washington state, where the Parkhursts had relocated, Belt spontaneously offered to relinquish his parental rights to H.P. if the Parkhursts would sign a statement that they were not accusing him of molesting the girl. The Parkhursts executed the requested document and Belt consented to the termination of his parental rights. Thereafter Ross Parkhurst began proceedings to adopt H.P., and H.P. sought and received assurance that she would not have to visit Belt in the future. Several days after the adoption ceremony, H.P. disclosed that Belt had raped her during the summers of 2001 and 2003. Belt was arrested by the Sebastian

County, Arkansas police and charged with felony sexual assault on December 5, 2003.

Chief Deputy Prosecuting Attorney Tabor and Prosecuting Attorney Shue were assigned to the case. The prosecutors expressed confidence in the overwhelming evidence against Belt. Shue stated, however, that as a matter of policy his office was reluctant to prosecute sexual abuse perpetrated by a close relative. As he put it, "no one wants these [incest] cases" and his office "would prefer not to prosecute such a case if it could find a reason not to." In their appellate brief Tabor and Shue suggested that victims of incest make "hesitant" and "incredible" witnesses and that the department prioritizes "other types of cases" as a result. Shue acknowledged that in this respect the departments' approach to incestuous assault differs from its approach to other sexual assault cases.

The Parkhursts claim that as a result of this policy Tabor and Shue sought a pretext for abandoning the Belt prosecution. Under Arkansas law the result of a polygraph test is inadmissible in a criminal proceeding unless the parties stipulate to its admissibility. The Parkhursts allege that Tabor and Shue were aware that an agreement to administer a polygraph examination and to stipulate that the result would be admissible was contrary to sound prosecutorial policy because the perpetrator of a sex crime is often able to pass a polygraph test. Despite their alleged knowledge that it would be inadvisable, Tabor and Shue arranged for the administration of a polygraph exam to Belt and stipulated that the results would

be admissible in court. On March 4, 2004 Belt took a polygraph test. The examiner posed only three relevant questions: (1) "Did you ever have sexual contact with [H.P.'s] private area?" (2) "Have you ever had sex with [H.P]?" and (3) "Is [H.P.] telling the truth about you having sex with her?" Belt was not asked about H.P.'s alleged diving board injury or the circumstances surrounding his offer to terminate parental rights. The polygraph examiner informed Tabor on March 16 that Belt "ha[d] been truthful in answering the . . . questions."

Several months later Tabor and Shue informed the Parkhursts by letter that they intended to issue a nolle prosequi as a result of the polygraph examination:

> [We are] convinced that the event occurred and, under normal conditions, would have no compunction whatsoever in proceeding to trial in this matter. However, . . . [i]n this case, because of the stipulated polygraph examination results, it is [our] belief that a grand jury would not convict the Defendant, Chad Belt . . . .

That same day Tabor and Shue issued the nolle prosequi and suspended the Belt prosecution.

On June 6, 2007 the Parkhursts brought a § 1983 action on H.P.'s behalf against Tabor and Shue, in both their official and individual capacities, and against Sebastian County, Arkansas, alleging a violation of H.P.'s right to

equal protection.[3] The Parkhursts asserted that H.P. was discriminated against as a member of a disfavored class they defined as victims of incestuous sexual abuse. They sought damages, an injunction requiring the reinstatement of the charges against Belt, and a declaratory judgment that the challenged prosecutorial policy violated the equal protection clause by failing to provide to victims of incest the same protection offered to other victims of sexual assault.

Tabor, Shue, and the county moved to dismiss for failure to state a claim, arguing that as victims the Parkhursts lacked standing to subject state prosecutorial decisions to constitutional scrutiny. The district court granted the motion, explaining that prosecutorial conduct may only be subjected to such review by those with a constitutional right to the nondiscriminatory prosecution of crime. That right, according to the district court, rests with defendants subjected to discriminatory prosecution but does not accrue to the victims of crime. The Parkhursts appeal, arguing that the district court erred in dismissing their suit because the Fourteenth Amendment guarantees to crime victims the nondiscriminatory prosecution of crime.

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[3] The complaint also included state claims against Belt for battery and outrage. Those claims were tried before a jury which found Belt liable for sexually abusing H.P. and awarded the Parkhursts $250,000 in compensatory damages and $750,000 in punitive damages. We recently affirmed that judgment on appeal. See Parkhurst v. Belt, No. 08-2668, 2009 WL 1586981 (8th Cir. June 9, 2009).

II.

We review de novo a district court's grant of a 12(b)(6) motion to dismiss. Botz v. Omni Air Int'l, 286 F.3d 488, 491 (8th Cir. 2002). In doing so we must accept as true the plaintiff's well pleaded allegations. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). To survive a motion to dismiss, a complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level . . . ." Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555 (2007).

Article III of the United States Constitution restricts the jurisdiction of the federal courts to actual cases and controversies. The case or controversy requirement has been effectuated by several doctrines, the most important of which is standing. Allen v. Wright, 468 U.S. 737, 750 (1984). To establish constitutional standing "the plaintiff must show that it has suffered an 'injury in fact' that is: concrete and particularized and actual or imminent; fairly traceable to the challenged action of the defendant; and likely to be redressed by a favorable decision." United States v. United Sec. Sav. Bank, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

Consistent with these principles, crime victims have standing to challenge allegedly discriminatory prosecutorial conduct only if those victims have a constitutional right to the nondiscriminatory prosecution of crime such that its deprivation constitutes injury in fact. Cf. Linda R.S. v. Richard

D., 410 U.S. 614, 617 (1977). To put it another way, the Parkhursts have standing to sue prosecuting authorities only if the discriminatory treatment they allege implicates the protections of the Fourteenth Amendment. While it is well settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim, see Linda R.S., 410 U.S. at 619 & n.5, this right has not been extended to crime victims.

In Linda R.S. the mother of an illegitimate child who was owed support payments sued on behalf of herself and all others similarly situated to enjoin the discriminatory application of a Texas statute criminalizing the failure to pay child support. 410 U.S. at 614-15. Although the text of the statute did not appear to distinguish between illegitimate and legitimate children, it had been construed by the courts of the state to apply only to parents of legitimate children. Id. at 615. Linda R.S. argued that this interpretation discriminated between legitimate and illegitimate children without a rational basis and therefore violated the equal protection clause. Id. at 616.

The Supreme Court concluded that Linda R.S. lacked standing to bring suit, explaining that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution" because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Id. at 619. The absence of this right, according to the Court, stems from the

"special status of criminal prosecutions in our system," which rejects a "direct nexus between the vindication of [victims'] interest[s] and enforcement of the State's criminal laws." Id.

The lower federal courts have maintained the distinction in standing between those prosecuted by the state and those who would urge the prosecution of others, even when the failure to prosecute was allegedly discriminatory. See United Sec. Sav. Bank, 394 F.3d at 567 ("private citizen generally lacks standing" to subject prosecutorial decisions to scrutiny); United States v. Grundhoefer, 916 F.2d 788, 791 (2d Cir. 1990) ("direct, distinct, and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced" thus private citizens cannot challenge decisions of prosecuting authority); Sattler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988) (victims lack constitutional right under equal protection clause to compel criminal prosecution); Doe v. Mayor and City Council of Pocomoke City, 745 F. Supp. 1137, 1139 (D. Md. 1990) ("The Court is not aware of a constitutional, statutory, or common law right that a private citizen has to require a public official to investigate or prosecute a crime."). A leading legal commentator on constitutional issues agrees. See Laurence H. Tribe, American Constitutional Law 124 (2d ed. 1988) ("the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern; only if the litigant

is immediately affected as a target of enforcement can that presumption be overcome").

The Parkhursts point to several cases where crime victims were determined to have a right to challenge the allegedly discriminatory provision of police protection. See, e.g., Estate of Macias v. Ihde, 219 F.3d 1018 (9th Cir. 2000); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). In Macias, family members of a slain woman brought a § 1983 suit alleging that police officers had ignored repeated complaints of threatened violence and provided "inferior police protection" because the decedent was a member of a disfavored class of victims, thereby violating the Equal Protection Clause. 219 F.3d at 1019. The Ninth Circuit concluded, without reaching the merits, that "[t]here is a constitutional right [] to have police services administered in a nondiscriminatory manner - a right that is violated when a state actor denies such protection to disfavored persons." Id. at 1028. When faced with a similar allegation of discriminatory police protection, the district court in Thurman determined that "[p]olice action is subject to the equal protection clause and section 1983 whether in the form of commission of violative acts or omission to perform required acts pursuant to the police officer's duty to protect." 595 F. Supp. at 1527.

The Parkhursts claim to have been injured by a failure to prosecute Belt rather than by a failure to provide police protection to H.P., and they point to no cases which have recognized a right to compel prosecution of a wrongdoer. That the standing

analysis differs depending on whether the alleged injury arises from a failure to prosecute or a failure to protect is not without rationale. While police officers are under a "statutorily imposed duty to enforce the laws equally and fairly," Thurman, 595 F. Supp. at 1527 (quoting Smith v. Ross, 482 F.2d 33, 36 (6th Cir. 1973) (per curiam)), "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion," United States v. Batchelder, 442 U.S. 114, 124 (1979). The Parkhursts, alleged victims of a discriminatory prosecutorial policy, did not suffer injury in fact as defined by the Supreme Court because they were "neither prosecuted nor threatened with prosecution." Thus, they lack standing to bring this claim against Tabor, Shue, and Sebastian County.[4]

III.

For the foregoing reasons, the judgment of the district court is affirmed.[5]

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[4] We note that the Parkhursts are not without other avenues to redress their grievance. Prosecutorial decisions are "discretionary public duties that are enforced by public opinion, policy, and the ballot." Pocomoke City, 745 F. Supp. at 1139.

[5] The motion of Tabor and Shue to strike documents from the appellants' appendix and submission of exhibits is denied as moot.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

**No: 08-2610**

**[Filed June 25, 2009]**

Ross Parkhurst, individually and as guardian and next friend of H. P.; Amy Parkhurst, individually and as guardian and next friend of H. P.; H. P., a minor child under the age of eighteen,

Plaintiffs - Appellants,

v.

Stephen Tabor, individually and in his official capacity as Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; Daniel Shue, individually and in his official capacity as Chief Deputy Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas; County of Sebastian, a body corporate and politic in the State of Arkansas,

Defendants - Appellees.

Chad Belt, an individual,

Defendant

Appeal from U.S. District Court
for the Western District of Arkansas - Ft. Smith
(2:07-cv-02068-RTD)

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**JUDGMENT**

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 25, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF ARKANSAS**
**FORT SMITH DIVISION**

**Civ. No. 07-2068**

**[Filed June 24, 2008]**

| | |
|---|---|
| ROSS PARKHURST and AMY PARKHURST, as next friend of H.P., a minor child under the age of eighteen | ) |
| PLAINTIFFS | ) |
| v. | ) |
| CHAD BELT | ) |
| DEFENDANT | ) |

**JUDGMENT**

On the 17th day of June 2008, this matter came on for trial to a duly selected jury consisting of eight members, the Honorable Robert T. Dawson presiding. Two members of the jury were excused during the course of the trial. The trial continued until June 20, 2008, when the case was submitted to the six-member jury on interrogatories and a

unanimous verdict was reached as to each interrogatory as follows:

**INTERROGATORY NO. 1:** ON PLAINTIFFS' CLAIM THAT DEFENDANT COMMITTED A BATTERY AGAINST H.P., WE THE JURY FIND IN FAVOR OF:

PLAINTIFFS __√__

DEFENDANT _____

**INTERROGATORY NO. 2:** ON PLAINTIFFS' CLAIM THAT DEFENDANT COMMITTED OUTRAGE AGAINST H.P., WE THE JURY FIND IN FAVOR OF:

PLAINTIFFS __√__

DEFENDANT _____

**INTERROGATORY NO. 3:** STATE THE AMOUNT OF COMPENSATORY DAMAGES THAT YOU FIND FROM THE PREPONDERANCE OF THE EVIDENCE SHOULD BE AWARDED TO PLAINTIFFS.

ANSWER: $250,000

**INTERROGATORY NO. 4:** STATE THE AMOUNT OF PUNITIVE DAMAGES THAT YOU FIND FROM CLEAR AND CONVINCING EVIDENCE SHOULD BE AWARDED TO PLAINTIFFS.

ANSWER: $750,000

**INTERROGATORY NO. 5:** ON DEFENDANTS' CLAIM THAT PLATINIFFS COMMITTED DEFAMATION AGAINST DEFENDANT, WE THE JURY FIND IN FAVOR OF:

PLAINTIFFS _√_

DEFENDANT ____

In accordance with this verdict, it is HEREBY ORDERED AND ADJUDGED that H.P. should have and recover of and from Defendant compensatory damages in the amount of $250,000.00, and punitive damages in the amount of $750,000, plus interest from the date of this judgment until paid at the current post-judgment interest rate of 2.75% per annum. Plaintiffs' counsel is directed to file any request for allowable costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure and Title 28, Section 1920 of the United States Code.

Dated this 24th day of June 2008.

*/s/ Robert T. Dawson*
Honorable Robert T. Dawson
United States District Judge

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF ARKANSAS**
**FORT SMITH DIVISION**

**Civ. No. 07-2068**

**[Filed October 30, 2007,**
**as amended November 26, 2007]**

ROSS PARKHURST and AMY PARKHURST, individually and as next friend of H.P., a minor child under the age of eighteen

PLAINTIFFS

v.

STEPHEN TABOR, individually and in his official capacity as Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; DANIEL SHUE, individually and in his official capacity as Chief Deputy Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; COUNTY OF SEBASTIAN, a body corporate and politic in the State of Arkansas;

CHAD BELT, an individual )
DEFENDANTS )
)

**MEMORANDUM OPINION & ORDER**

This case requires the Court to determine whether a crime victim can invoke federal jurisdiction to challenge as violative of her right to equal protection a state decision not to prosecute the party she accuses for reasons of class-based discriminatory prejudice against that victim. Plaintiffs in the present case, the biological mother and adoptive father of H.P., a minor child, allege prosecutors for the State of Arkansas acted with invidious prejudice against H.P. and similarly situated crime victims in declining in the face of overwhelming evidence of guilt to prosecute Chad Belt, biological father of H.P., for sexual abuse. Before the Court are motions to dismiss (Docs. 7, 17) filed pursuant to Fed. R. Civ. Pro. 12(b)(6) by separate Defendants, Sebastian County, Arkansas and named prosecutors, and responsive pleadings, which raise *inter alia* the issue of whether the decision not to prosecute Belt injured H.P. in such a personalized and direct manner that Plaintiffs have standing to bring suit under 42 U.S.C. § 1983 to test that decision against the equal protection mandate of the Fourteenth Amendment. Whereas the Court finds no constitutional right of crime victims to the nondiscriminatory prosecution of crime, and for reasons reflected herein, the Court determines Plaintiffs are without standing, and Defendants' motions are GRANTED.

## I. Background

In ruling on motions under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations of plaintiffs and make all reasonable inferences in favor of plaintiffs. *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). Thus, the Court recites the facts, in the light most favorable to Plaintiffs, as follows:

H.P. was born on May 8, 2000 out of the marriage of Plaintiff Amy Parkhurst and Defendant Chad Belt, who resided at that time in the State of Arkansas. Following the divorce of Parkhurst and Belt on August 23, 2000, Parkhurst maintained custody of H.P. and Belt was permitted visitation privileges during the summer months. On December 23, 2001, Parkhurst married Plaintiff Ross Parkhurst, and the new family eventually relocated from Arkansas to Vancouver, Washington.

Following H.P.'s first visit with Belt in the summer of 2001, H.P. pleaded with Parkhurst not to require her to return to Belt's home. When Belt arrived the following summer to retrieve H.P. for her visit, H.P. suffered a nervous breakdown and was not required to go with Belt. However, Belt insisted that H.P. resume visitation in 2003. During that visit, Parkhurst detected increasing agitation and emotionality in H.P. during phone conversations. H.P. attributed her distress to the fact that Belt had, in a violent rage, beaten H.P.'s pet dog to death. Parkhurst's concerns grew when, on July 21, 2003, H.P. informed Parkhurst that

H.P. had suffered injury to her genital area in a diving board accident. (Doc. 1 ¶¶ 25, 26.)

Out of concern for the true nature of H.P.'s injuries and Belt's failure to procure medical treatment for H.P., Parkhurst traveled to Arkansas. Parkhurst found H.P. to have extensive injuries but reluctant to discuss the cause. Parkhurst removed H.P. from Belt's home and immediately sought medical treatment for her in Arkansas. Medical personnel diagnosed H.P. as a victim of sexual abuse and referred the matter to the Crimes Against Children Division ("CACD") of the Arkansas State Police. CACD determined that H.P. had been sexually abused but that H.P. maintained that she had been injured on a diving board for fear of identifying the perpetrator. The Children Safety Center in Springdale, Arkansas diagnosed H.P. as a victim of sexual trauma and identified Belt as the alleged perpetrator despite H.P.'s refusal to accuse Belt.

After returning to Washington, Parkhurst was contacted by Belt and his attorney, who on their own initiative offered to terminate Belt's parental rights and allow Ross Parkhurst to adopt H.P. in exchange for a letter stating that H.P. had never accused Belt of sexual abuse. (Doc. 1 ¶¶ 34, 35.) Parkhurst agreed.

Upon learning that she would not have to return to Arkansas, H.P. informed Parkhurst that Belt had sexually abused and raped her in the summers of 2001 and 2003. (Doc. 1 ¶¶ 39, 40.) A psychiatrist confirmed the credibility of H.P.'s allegations, and

the Arkansas Crime Victims Reparations Board awarded H.P. a sum for medical expenses. Belt was arrested by Sebastian County police and charged with felony sexual assault.

Prosecuting attorney Tabor and Chief Deputy Prosecuting Attorney Daniel Shue were assigned to Belt's case. The prosecutors expressed confidence in the overwhelming evidence against Belt. (Doc. ¶ 45.) However, according to Plaintiffs' complaint, Defendant Shue expressed to third parties, and Defendant Tabor confirmed, awareness of a policy or custom of his office against prosecuting sexual abuse cases that involve incest and a preference for finding reasons not to proceed with them. (Doc. 1 ¶ 46.) After further investigation, the prosecutors filed a *nolle prosequi* and dropped the charges against Belt.[1]

On June 6, 2007, Plaintiffs filed a complaint on H.P.'s behalf[2] against Defendant Belt under state tort law alleging battery and against Defendant prosecutors and Sebastian County, Arkansas under § 1983 alleging violations of H.P.'s right to equal protection. Plaintiffs seek damages and an injunction requiring the reinstatement of the charges against Belt. Plaintiffs contend H.P. was discriminated against as a member of a class they

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1 Defendants allege their decision was based on the fact that Belt successfully passed a polygraph examination after the prosecutors stipulated to its admissibility.

2 Fed. R. Civ. Pro. 17(c) permits guardians to sue on behalf of infant children as their representatives.

define as victims of incestuous sexual abuse. Pursuant to Defendants' motions to dismiss, the Court must determine whether H.P. suffered a personal injury resulting from the decision not to prosecute Belt such that Plaintiffs have standing to bring suit under § 1983.

**II. Standard of Review**

When a dispositive issue of law precludes a plaintiff from being entitled to relief regardless of the set of facts, consistent with its allegations, the plaintiff might prove, Rule 12(b)(6) authorizes a court to dismiss that plaintiff's claims. *Neitzke v. Williams* 490 U.S. 319, 326-327 (1989); *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). In order to streamline litigation and dispense with needless discovery and factfinding, courts are required to dismiss legal claims that are destined to fail regardless of whether they are nearly viable. *Neitzke*, 490 U.S. at 326-27 (stating "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable . . . . [A] claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (May 21, 2007). Further, those factual allegations must be contained in the four corners of the complaint to be cognizable to a court ruling on a motion to dismiss. *Florida State Bd. of Admin. v. Green Tree Financial Corp.*, 270 F.3d 645, 663 (8th Cir. 2001).

However, a court may not dismiss claims for mere disbelief of a plaintiff's allegations, *Neitzke*, 490 U.S. at 327. Courts must accept as true a plaintiff's well-pleaded allegations, draw all reasonable inferences in favor of the plaintiff and construe complaints liberally. *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988); *Hafley*, 90 F.3d at 266; *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Courts should bear in mind that "[t]he issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims." *Aceto Agr. Chemicals Corp.*, 872 F.2d at 1376.

In the case at bar, the Court finds presentation of evidence to be unnecessary. Accepting as true the allegations of Plaintiffs and making all reasonable inferences in favor of Plaintiffs, the Court finds no provable set of facts on which Plaintiffs might establish standing to maintain an action under § 1983. H.P. cannot be said to be personally injured by the decision not to prosecute Belt because the Constitution does not guarantee to H.P. the nondiscriminatory prosecution of crimes against her.

## III. Discussion

Defendants challenge Plaintiffs' standing to invoke the jurisdiction of this Court under Article III of the United States Constitution, which restricts the jurisdiction of federal courts to actual cases and controversies. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The case or controversy requirement effectuates the principle of separation

of powers on which the Federal Government is founded, *id.*, and is thus "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). In response to "concern about the proper–and properly limited–role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), the case or controversy requirement has been crystalized by several doctrines, the most important of which, raised here by Defendants, is the doctrine of standing. *See Allen*, 468 U.S. at 750. The Court must determine whether crime victims have standing to invoke the Article III adjudicatory power to subject state prosecutorial decisions to constitutional scrutiny or whether such decisions are "discretionary public duties that are enforced by public opinion, policy, and the ballot." *Doe v. Mayor and City Council of Pocomoke City*, 745 F. Supp. 1137, 1139 (D. Md. 1990). In other words, when prosecutors decline to charge perpetrators of crimes against a particular class of citizens for prejudicial disfavor of that class, can those victim-citizens make constitutional challenges or must they resort to the political process to hold prosecutors accountable? May they respond to prosecutorial selectivity personally as litigants or must they respond collectively as voters?

In order to have standing to invoke the judicial process, a plaintiff must allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Valley Forge Christian Coll. v.*

*Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). "Standing it is admitted does not always lend itself to consistently logical analysis. But injury in fact stands on this subject like a deeply driven channel marker for all to see while the swirl and eddy of inconsistent currents round-about it." *U.S. v. Grundhoefer*, 916 F.2d 788, 791-92 (2nd Cir. 1990). The personal injury requirement has the effect of preventing litigants from raising the rights of other individuals, barring adjudication of generalized grievances more appropriately addressed by the political process and the mechanics of representative government and requiring plaintiffs to be possessed of an interest protected by the law invoked. *See Allen*, 468 U.S. at 751. Plaintiffs must assert an interest more particularized and personal than the general interest of the public in the evenhanded administration of justice. Plaintiffs must "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," *Baker v. Carr*, 369 U.S. 186, 204 (1962), and an injury in fact that is concrete, particularized, actual or imminent, fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). The harm alleged by Plaintiffs cannot be conjectural or hypothetical, *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983), nor can it be merely abstract, *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); rather, it must be "distinct and palpable." *Warth*, 422 U.S. at

501. If Plaintiffs cannot make a showing sufficient to satisfy those minima, the Court is "powerless to create its own jurisdictionby embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-156 (1990). Accordingly, the Court must determine whether H.P. has a personal interest, in the form of a constitutional right to the nondiscriminatory prosecution of crime, such that she suffers direct and personal injury from the decision not to prosecute Belt.

While there are broad and expansive categories of personal interests that confer standing on a party, the requirement remains firm that a potential plaintiff must herself have suffered injury. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-17 (1973); *see also Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). "[W]e have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R.S.*, 410 U.S. at 617 (citing *e.g. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972); *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Baker*, 369 U.S. at 204) (footnotes omitted). Plaintiffs have standing to maintain suit if the discriminatory treatment they allege implicates the protections of the Fourteenth Amendment such that they are constitutionally and judicially cognizable. Prosecutorial conduct may only be subjected to constitutional scrutiny by crime victims if those

victims have a constitutional right to the nondiscriminatory prosecution of crime.

The Court can find no decision recognizing such a right and has found courts and scholars to be unanimous in their disavowal of its existence. Urged by a litigant to recognize "an enforceable right . . . as a victim to have [] defendants criminally prosecuted" and "that such a right was protected by the equal protection clause," the Fourth Circuit stated axiomatically that "[t]here is, of course, no such right." *Sattler v. Johnson,* 857 F 2d 224, 227 (4th Cir. 1988); *see also Sellner v. Panagoulis,* 565 F. Supp. 238, 250 (D. Md. 1982) (stating "[t]his court does not know of any right afforded by either the Constitution or laws of the United States to private persons to compel a state to prosecute criminal activity."), *cert. denied,* 479 U.S. 1069 (1987); *Doe*, 745 F. Supp. at 1139 (stating "[t]he Court is not aware of a constitutional, statutory, or common law right that a private citizen has to require a public official to investigate or prosecute a crime."); *Linda R.S.*, 410 U.S. at 619 (finding mother to be without standing to seek injunction requiring district attorney to prosecute father for failure to make child support payments because "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

Crime victims lack standing to challenge prosecutorial decisions due to the "special status of criminal prosecutions in our system," which prevents the establishment of a "direct nexus between the vindication of [victims'] interest[s] and

enforcement of the State's criminal laws" such that victims would be considered to have a personal stake in state punishment of crime. *Linda R.S.*, 410 U.S. at 619. That conclusion is drawn necessarily from the fundamental purposes of the criminal justice system. Criminal law operates on the public level through penalty and determent to protect the interests of the public at large, and it will not reach into the province of civil law to offer compensation to and contemplate the personal interests of individuals who suffer particularized injury. *See LaFave and Scott*, Criminal Law Handbook, 11, West Publishing (1977). "Collateral individuals to [a criminal] proceeding . . . have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim," *Grundhoefer*, 916 F.2d at 791, because crime is not prosecuted for the benefit of the victimized; crime is prosecuted on behalf of the state in the collective interest of the public. Thus, it is generally recognized that:

> The direct, distinct and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced. It is the defendant and he alone that suffers the direct consequences of a criminal conviction and sentence. . . . For this reason a private citizen generally lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.

*Id.* at 791-92 (denying standing to bankruptcy trustee to appeal restitution order imposed on debtor's principals) (quotations omitted); *see also Younger v. Harris*, 401 U.S. 37, 41 (1971) (finding certain plaintiffs to lack standing to challenge a criminal statute where "[n]one ha[d] been indicted, arrested, or even threatened by the prosecutor."); *U.S. v. United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (finding crime victims to be without standing to challenge through appeal the criminal restitution orders of federal district courts); *Whitmore*, 495 U.S. at 157 (denying inmate standing to bring challenge to another inmate's death sentence under the Eighth Amendment). Regardless of whether a constitutional challenge is brought by a crime victim or another party collateral to a criminal prosecution, the rule abides that "the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern." L. Tribe, *American Constitutional Law* § 3-16, at 124 (2d ed. 1988).

The Court is well advised of those decisions that warn:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the

> denial of equal justice is still within the prohibition of the constitution.

*U.S. v. Handler*, 383 F. Supp. 1267, 1270-71 (D. Md. 1974). However, the case or controversy requirement of Article III extends to criminal defendants and those threatened with prosecution unique judicial standing to make selective enforcement challenges under the Equal Protection Clause. *See e.g. Stemler v. City of Florence*, 126 F.3d 856, 872-73 (6th Cir. 1997). While it is said that the standing requirement "does not insulate executive action from judicial review . . . [or] prevent any public interests from being protected through the judicial process," *Sierra Club*, 405 U.S. at 740, the current state of the law does not permit crime victims to vindicate whatever interests they may have in the prosecution of crime through the judicial process. Undoubtably, victims of crime would be gratified to see perpetrators punished, however, that interest is not protected by the Equal Protection Clause. The Court recognizes the paradigm that, while only the prosecuted have standing to challenge a prosecutorial regime that favors victimizers of certain disfavored victims, claims such as Plaintiffs' arise only in the absence of prosecution. The true parties in interest stand to benefit from the discriminatory conduct and thus will be disinclined to make constitutional challenges. However, whereas Plaintiffs are unable to show that H.P. sustained some direct and actual injury, more particularized than one to her general interest in seeing equality and fairness in enforcement of the laws, the Court must find Plaintiffs have failed to raise a justiciable case or

controversy. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Ex parte Levitt*, 302 U.S. 633, 634 (1937). Any ruling to the contrary would violate the fundamental principles of federalism and separation of powers that define and limit the power of this Court.

## IV. Conclusion

Based on the foregoing, Defendants' motions to dismiss are GRANTED as to Plaintiff's constitutional claims and those claims are DISMISSED WITH PREJUDICE. Whereas the Court disposes of Plaintiffs' claims on the basis of lack of standing, it intimates no view as to the merits of those claims. Whereas Plaintiffs' state claims against Defendant Belt are properly brought based on 28 U.S.C. § 1332, those claims remain pending in this Court.

IT IS SO ORDERED this 30th day of October 2007.

/s/ Robert T. Dawson
Robert T. Dawson
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF ARKANSAS**
**FORT SMITH DIVISION**

**Civ. No. 07-2068**

**[Filed October 30, 2007]**

| | |
|---|---|
| ROSS PARKHURST and AMY PARKHURST, individually and as next friend of H.P., a minor child under the age of eighteen | ) |
| PLAINTIFFS | ) |
| v. | ) |
| STEPHEN TABOR, individually and in his official capacity as Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; DANIEL SHUE, individually and in his official capacity as Chief Deputy Prosecuting Attorney for Twelfth Judicial District, Sebastian County, State of Arkansas; COUNTY OF SEBASTIAN, a body corporate and politic in the State of Arkansas; CHAD BELT, an individual | ) |
| DEFENDANTS | ) |

**JUDGMENT**

For reasons set forth in the Memorandum Opinion, filed contemporaneously herewith,

Defendants' motions to dismiss (Docs. 7, 17) are **GRANTED**.

IT IS SO ORDERED this 30th day of October 2007.

*/s/ Robert T. Dawson*
Robert T. Dawson
United States District Judge

**AO72A (Rev. 8/82)**

## APPENDIX D

### UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**No: 08-2610**

**[Filed August 6, 2009]**

| | |
|---|---|
| Ross Parkhurst, individually and as guardian and next friend of H. P., et al., | ) |
| Appellants | ) |
| v. | ) |
| Stephen Tabor, individually and in his official capacity as Prosecuting Attorney for the Twelfth Judicial District, Sebastian County, State of Arkansas, et al., | ) |
| Appellees | ) |
| Chad Belt, an individual, | ) |

Appeal from U.S. District Court
for the Western District of Arkansas - Ft. Smith
(2:07-cv-02068-RTD)

## ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Shepherd did not participate in the consideration or decision of this matter.

August 06, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

## APPENDIX E

### U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

### 42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 09-561

Supreme Court, U.S.
FILED
DEC 9 - 2009
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

ROSS PARKHURST and AMY PARKHURST,
individually and as guardians and next friends of H.P.,
A minor child under the age of eighteen,

*Petitioners,*

v.

STEPHEN TABOR, DANIEL SHUE,
and COUNTY OF SEBASTIAN,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Do the Petitioners have standing to bring an equal protection suit against the Respondents, two state prosecutors and an Arkansas County, for their failure or refusal to prosecute the alleged perpetrator of a crime against the Petitioners' ward?

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sebastian County, Arkansas, respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any ... person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

* * *

U.S. Const. amend. XIV provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

On June 27, 2007, Petitioners Ross and Amy Parkhurst, Plaintiffs below individually and as next friends of a minor referred to as "H.P.," filed suit in the United States District Court for the Western District of Arkansas, under 42 U.S.C. §1983, alleging, *inter alia*, that Sebastian County, Arkansas and state prosecuting attorneys Stephen Tabor and Daniel Shue violated the Plaintiff's equal protection rights by *not* prosecuting H.P.'s alleged molester, Chad Belt.[1] Shortly after the filing of the Petioner's Complaint in the District Court, Sebastian County and state prosecutors Tabor and Shue separately moved to dismiss the case, primarily on the basis that the Plaintiffs lacked standing to challenge Mr. Belt's non-prosecution and on the prosecutors' invocation of prosecutorial immunity. After the Petitioners responded, the District Court granted the Respondents' separate motions to dismiss and issued an Opinion and Judgment dismissing Plaintiffs' Constitutional claims with prejudice. App. B & C to Petition for Writ of Certiorari, pp. 15a-34a. The Petitioners thereafter

[1] The Petitioners also sued Chad Belt directly, alleging that he molested H.P. Those claims were eventually tried to a jury, resulting in a verdict in Petitioners' favor. That verdict is not the subject of this appeal.

appealed to the Eighth Circuit Court of Appeals, which affirmed the holding of the District Court and issued a Judgment in the Respondents' favor. App. A to Petition for Writ of Certiorari, pp. 1a-14a. The Petitioners now seek review of the Judgment of the Court of Appeals by a Writ of Certiorari.

Since this appeal arises from the District Court's grant of the Respondents' respective motions to dismiss, and the Court of Appeals' affirmation of that holding, the facts relevant to this appeal are almost entirely those facts pleaded by the Petitioners in their Complaint (*see* Petitioners' Appendix, pp. 3a-7a, 20a-23a), with one exception. The Petitioners' allegation that "H.P.," a minor, was the victim of molestation by Separate Defendant Chad Belt (the principal basis for her argument that she belongs in a class of incest victims), is not entitled to the same deference as the remainder of her allegations, even at this early procedural stage (i.e., on motions to dismiss). In short, while a plaintiff's allegations are normally accepted as true by the Court on a motion to dismiss, such allegations should not be accepted when, as here, they baldly contradict what is perhaps the strongest presumption in American law. As the Petitioners admit, Separate Defendant Belt was never prosecuted, much less convicted and, accordingly, is entitled to the presumption of innocence. Of course, this would be important in an analytical sense in this case as the Petitioners would be unable to establish that they even belong to the class of victims they seek to represent and would therefore be unable

to cross the initial threshold of an equal protection claim.

For the reasons set forth below, the Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

## REASONS FOR DENYING THE PETITION

In spite of the Petitioners' attempts to shift the focus of the inquiry, the sole, dispositive question in this case is whether the Petitioners have standing to assert an equal protection claim against the Respondents, two state prosecutors and an Arkansas County, for their failure or refusal to prosecute the alleged assailant of their ward, a minor child referred to in this action as "H.P." Ultimately, for a number of reasons, this question has always been and must always be answered in the negative. Because no other court, including this Court, has ever ruled differently, Certiorari is improper and the Petition should be denied.

The Petitioners' sole claim against the Respondents, Sebastian County, Arkansas, Stephen Tabor, and Daniel Shue (Tabor and Shue were prosecuting attorneys in Sebastian County) is that the Constitutional rights of a minor, referred to as "H.P.," have been violated because the Respondents did not prosecute H.P.'s alleged molester for his alleged sexual assault(s) on H.P. The District Court held that the

Petitioners lacked standing to bring an equal protection claim against the Respondents and the Eighth Circuit Court of Appeals affirmed.

The Petitioners' allegation(s) that the Respondents' non-prosecution of H.P.'s alleged molester fails as a matter of law because the Petitioners lack standing to contest the prosecution or non-prosecution of a third party. Standing is a doctrine meant to reinforce the case or controversy requirement, which in turn effectuates the appropriate separation of powers in our democratic society. The standing doctrine requires, *inter alia*, that a civil plaintiff must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The District Court correctly held, and the Court of Appeals affirmed, that the Petitioners could not make a showing of personal injury in this case because they have no judicially cognizable interest in the prosecution or non-prosecution of H.P.'s alleged assailant. Since no holding of this Court or of the various Courts of Appeals has ever reached a different conclusion, the Petition for a Writ of Certiorari is improper and should be denied.

## I. The Court of Appeals' holding that the Petitioners had no standing to pursue an equal protection claim against the Respondents is not contrary to the precedents of this Court and does not create a circuit split because no case has ever held that the prosecution or non-prosecution of an individual constitutes the "treatment" of any third party under the Equal Protection Clause.

One of the most important practical problems that would be created if the Petitioners' arguments were accepted in this case (i.e., if "alleged" crime victims were allowed to sue prosecutors under the equal protection clause for the prosecution or non-prosecution of a third party) would be the torrent of litigation that would inevitably follow. Common sense dictates that someone would object (just as someone else would applaud) virtually every time the decision was made not to prosecute a purported offender. In light of the emotion and personal nature of criminal justice, the objecting party would almost certainly seek justice in the civil courts (if permitted). As such, if the Petitioners' arguments really were founded on the bedrock of established law, as they claim, the string of cases in exactly the same procedural posture would no doubt go on for pages. Yet, in the most glaring omission in their briefing (both here and in the Courts below), the Petitioners fail to offer a single citation to a procedurally identical case, instead relying on comparative analogies and unfounded analytical leaps. The Petitioners' dearth of case law

support (no procedurally identical cases) results from the simple fact that Petitioners' theory is entirely novel. In the end, Petitioners' equal protection claim(s) fail because no case has ever held that the non-prosecution of a third party constitutes the "treatment," equal or otherwise, of any third party, including the alleged[2] victim, under the equal protection clause.

The Equal Protection Clause generally requires the government to treat similarly situated people alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Dissimilar treatment of dissimilarly situated persons does not violate equal protection. *See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 242 (8th Cir. 1994). Thus, the first step in an equal protection case is determining whether the plaintiff has demonstrated that he was treated differently than others who were similarly situated to him. *See, e.g., Samaad v. City of Dallas*, 940 F.2d 925, 940-41 (5th Cir. 1991). Absent a threshold showing that he is similarly situated to those who allegedly receive favorable treatment, the Petitioners cannot have a viable equal protection claim. *See id.* at 941.

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[2] Notably, the Petitioners seek to raise their equal protection claim as members of an entirely artificial and self-created class of "alleged" victims. Of course, anyone can be an alleged victim, merely by saying that they are one.

The Petitioners argue that Petitioner H.P. belongs to a class of victims who are disfavored by the selective prosecutorial policy alleged in the Complaint, which allegedly *treats* the complaints of alleged incest victims such as H.P. less seriously than other alleged sexual assaults. Petition for Writ of Certiorari, p. 10. Of course, the Petitioners contend that the alleged assault of H.P. was treated less seriously by the prosecutors and the County precisely because the alleged perpetrator, Chad Belt, was not prosecuted. In short, despite the Petitioners' semantical attempts to couch the matter differently, the discriminatory or unequal "treatment" the Petitioners allege is the non-prosecution of the alleged offender.

The Petitioners, of course, do not cite any cases standing for the proposition that the non-prosecution of a third party constitutes "treatment" of the alleged victim for equal protection purposes and neither undersigned counsel nor the District Court nor the Court of Appeals could find any such cases. Instead, the cases uniformly hold that the prosecution or non-prosecution of an alleged criminal does not constitute "treatment" of any other person (other than the criminal defendant, of course), such that no individual can suffer a legally cognizable injury by virtue of the prosecution or non-prosecution of a third party. *See Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("in American jurisprudence at least, a private citizen lacks a judicially cognizable

interest in the prosecution or nonprosecution of another"); *Oliver v. Collins,* 904 F.2d 278, 281 (5th Cir. 1991); *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) ("[t]here is, of course, no such right [for a victim to have an alleged criminal prosecuted]"); *Sellner v. Panagoulis*, 565 F.Supp. 238, 250 (D.Md. 1982) ("[t]his Court does not know of any right afforded . . . to private persons to compel a state to prosecute criminal activity"), *cert. denied*, 479 U.S. 1069; *Rial v. Burmila,* 782 F.Supp. 1291 (N.D.Ill. 1992); *Johnson v. Craft,* 673 F.Supp. 191, 193 (S.D.Miss. 1987) (complaint by victim of assault alleging conspiracy to prevent prosecution of perpetrators dismissed). This is true even where the person seeking the prosecution was the victim of a criminal offense committed by the other. *Sattler,* 857 F.2d at 227; *Oliver,* 904 F.2d at 281.

In the end, no case has ever held that the prosecution or non-prosecution of an alleged criminal offender constitutes "treatment" of a third party to the criminal proceeding, including the alleged victim, under the Equal Protection Clause. In fact, the courts have uniformly held exactly the opposite. Accordingly, since the Petitioners cannot prove that *they* were subject to any "treatment" by the Respondents, they lack standing as a matter of law and their equal protection claim necessarily fails. As such, the Judgments of the District Court and the Court of Appeals should be affirmed.

## II. The Court of Appeals' holding that the Petitioners had no standing to pursue an equal protection claim against the Respondents is not contrary to the precedents of this Court and does not create a circuit split because the "selective prosecution" cases cited by the Petitioners do not allow a suit by any person to compel the prosecution of a third party by the state since "selective prosecution" cases (1) must be brought by the criminal defendant and (2) must concern the prosecution of the criminal defendant.

The Petitioners cite a line of cases, commonly referred to as "selective prosecution" cases, in an attempt to overcome the Court of Appeals' holding that the Petitioners have no standing to pursue their Constitutional claims against the Respondents. The Petitioners argue that the allegations in the instant case are indistinguishable from those in the selective prosecution cases and that their claims are as justiciable as those claims. Contrary to the Petitioners' arguments, however, this case is distinguishable from the selective prosecution cases, primarily because of the parties bringing the action. In short, the Petitioners in this case were neither prosecuted nor had the law enforced against them, "selectively" or otherwise.

The four cases cited in the Petition for a Writ of Certiorari are plainly distinguishable from the instant case for at least two reasons. First there is a

plain distinction with regard to the identities of the plaintiffs. In the four cases cited in the Petition, *U.S. v. Frazier*, 408 F.3d 1102 (8th Cir. 2005); *U.S. v. Leathers*, 354 F.3d 955 (8th Cir. 2004), *rehearing and rehearing en banc denied, cert. denied*, 543 U.S. 844 (2004); *U.S. v. Batchelder*, 442 U.S. 114 (1979); and *U.S. v. Armstrong*, 517 U.S. 456 (1962), the civil plaintiffs were the criminal defendants themselves, objecting to their own prosecution, not the prosecution or non-prosecution of a third party. In fact, the Eighth Circuit Court of Appeals made this point clear in the *Leathers* case when it set forth the elements of a "selection prosecution" case as requiring a plaintiff to show "1) that he [not a third party] has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct and 2) that the government's action in thus singling him [not a third party] out was based on an impermissible motive such as race, religion, or the exercise of constitutional rights." *Leathers,* 354 F.3d at 963 (quoting *U.S. v. Parham,* 16 F.3d 844, 846 (8th Cir. 1994)). In the end, the Petition rebuts a false argument not made by the Respondents, the District Court, or the Court of Appeals. The Respondents do not dispute that claims for "selective prosecution" can be successfully pursued under the Equal Protection Clause, just that such claims can only be pursued by those with a legally cognizable interest in the subject prosecution (i.e., the criminal defendant), otherwise known as standing.

In addition to the distinction as to the parties making the claims, the four criminal cases cited in the Petition also deal with a different subject matter. Specifically, the criminal cases cited by the Petitioner deal with the prosecution of a criminal defendant, not the non-prosecution of a criminal suspect, as is the issue in this case. This distinction is important because it reveals an overwhelming absence of support for the Petitioners' position. Specifically, the undersigned has been unable to find any case (neither the Petitioners nor the District Court nor the Court of Appeals ever cited such a case) in which a civil plaintiff has ever withstood a standing challenge or otherwise successfully pursued a civil claim contesting the non-prosecution of any person.[3] This complete dearth of cases can lead to only one conclusion, namely, that no individual suffers legally cognizable injury due to the criminal non-prosecution of any individual, including both the alleged offender and the alleged victim (the victim because he has no cognizable interest regardless of the prosecutorial decision and the offender because he cannot and

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[3] In making this statement, the Separate Respondent is not attempting to minimize or dispute the core holdings of the "selective prosecution" line of cases cited in the Petition (i.e, that criminal defendants may sue under the Equal Protection Clause where they assert that their prosecution was "unequal"). Instead, the Respondent merely contends that such actions actually contest the prosecution of the civil plaintiff rather than the non-prosecution of some third party.

would not claim injury as a result of "unequal" prosecution where he is not prosecuted).

In the end, the distinctions between the "selective prosecution" line of cases cited by Petitioners and the novel "selective non-prosecution" theory advanced by the Petitioners serve to reveal the Petitioners' lack of a legally cognizable interest in the non-prosecution of H.P.'s alleged assailant. Because the Petitioners lack standing and no case of this Court or of the Courts of Appeals has ever held differently, the Petition for a Writ of Certiorari should be denied.

## III. The Court of Appeals' holding that the Petitioners had no standing to pursue an equal protection claim against the Respondents is not contrary to the precedents of this Court and does not create a circuit split because the "selective enforcement" cases cited by the Petitioners do not allow a suit by any person to compel the prosecution of a third party by the state since "selective enforcement" cases prohibit only the unequal denial of police "protective services" to complainants by local police agencies and have nothing to do with state prosecutorial functions.

The Petitioners also cite a line of cases commonly referred to as "selective enforcement" cases. These selective enforcement cases generally stand for the proposition that police may not ignore complaints and/or provide protective services in an unequal

manner to similarly situated citizens. For instance, in *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that a decedent's family could proceed to trial on their section 1983 claim against the local police where the family had offered some evidence that the police had refused their protective services to the decedent because she was a member of a disfavored class of citizens. Similarly, in *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), the Second Circuit Court of Appeals affirmed a jury verdict against the local police where the evidence showed that the police followed a policy of investigating the first complaint, but never the second complaint, with regard to any particular incident, thereby providing unequal treatment to similarly situated complainants. In *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D.Conn. 1984), the District Court for the District of Connecticut affirmed the denial of a city police department's motion to dismiss where the Plaintiff made allegations that, while police protection was fully provided to persons assaulted by strangers, the police consistently afforded lesser protection where, as the Plaintiff asserted in her case, the victim was assaulted by a relative or boyfriend. The Petitioners accurately summarize the holdings of these cases by reciting the words of this Honorable Court, as quoted by the Eighth Circuit Court of Appeals, that "the state may not 'selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.'" Petition for a Writ of Certiorari, p. 17 (quoting *Freeman v. Ferguson*, 911

F.2d 52, 55 (8th Cir. 1990) (quoting *Deshaney v. Winnebago County Dept. Of Social Services*, 489 U.S. 189, 197 109 S.Ct. 998, 1004 n. 3 103 L.Ed.2d 249, 259 (1989)).

The principal problem with the Petitioners' citation of the "selective enforcement" line of cases is that those cases have nothing to do with this case. The selective enforcement cases prohibit the denial of police "protective services" to disfavored minorities, however, the Petitioners in this case have not alleged that they were denied any protective services, but that they were denied the prosecution of their alleged assailant. Prosecution of a criminal offender, however, is not a "protective service" provided to other citizens by the police. As the District Court correctly noted in its Opinion, "[c]ollateral individuals to [a criminal] proceeding . . . have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim because crime is not prosecuted for the benefit of the victimized; crime is prosecuted on behalf of the state in the collective interest of the public." *See* Appendix to Petition, p. 29a (quoting *U.S. v. Grundhoefer*, 916 F.2d 788, 791 (2d Cir. 1990)).

In the end, the selective enforcement cases, like the other cases cited by the Petitioners, fail to overcome the fact that the Petitioners have no judicially cognizable interest in the prosecution of non-prosecution of a third party. This fact remains no matter how the Petitioners attempt to couch their allegations and precludes the Petitioners' claim(s) as

a matter of law. Accordingly, since there are no cases in conflict with the Judgment of the Court of Appeals herein, the Petition for a Writ of Certiorari should be denied.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 09-561

In The
# Supreme Court of the United States

ROSS PARKHURST and AMY PARKHURST, individually and as guardians and next friends of H.P., a minor child under the age of eighteen,
*Petitioners*,

v.

STEPHEN TABOR, DANIEL SHUE and COUNTY OF SEBASTIAN,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INTRODUCTION

A brief in opposition to the Petition for a Writ of Certiorari filed herein has been submitted by Respondent Sebastian County, Arkansas (hereafter, "Brief in Opposition").

Petitioners respectfully submit that the Brief in Opposition contains new argument that requires a reply, particularly because Sebastian County seriously misstates existing law and advances a "policy" argument that would eviscerate the fundamental principle enunciated in case law spanning twenty-five years: that crime victims belonging to a disfavored class are entitled to the same quality of justice from state law enforcement officers enjoyed by everyone else. Accordingly, Petitioners respectfully submit the instant reply brief pursuant to Rule 15.6 of this Court.

As the Court is aware, this case involves a claim under the Equal Protection clause arising from the deliberate abandonment of the prosecution of Chad Belt – the biological father and rapist of Petitioner H.P., a minor – by Respondents (who are prosecutors and their supervising county) because of class-based discrimination against incest victims such as H.P.

Sebastian County makes three novel – and erroneous – arguments in opposition to certiorari. First, Sebastian County misrepresents the Constitutional injury H.P. has suffered, and therefore the Constitutional right at stake. It claims the only injury asserted by Petitioners is the non-prosecution of Chad Belt. That is false. Petitioners' injury consisted in discrimination by Respondents – law enforcement officers – that manifested in Respondents' indefensible abandonment of the prosecution of Chad Belt, merely because his victim was also his minor daughter and Respondents did not like to pursue incest cases. Indeed, at the dismissal stage, the trial court was required to accept as true the allegation that it was the policy or practice of the Respondents not to pursue prosecution of cases of incestuous sexual assault under circumstances in which other felonies would have been fully prosecuted. (Fed. R. Civ. P. 12(b).)

Second, Sebastian County – without any authority whatsoever – asserts that prosecutors are not law enforcement officers, do not contribute to the protective service of law enforcement as do police officers, and therefore are not governed by the same equal-protection principles that they admit govern law enforcement officers other than prosecutors. This is preposterous: Prosecutors are no less law enforcement officers than police, are part of the same justice system that exists to protect the public, and are bound by the same Constitutional constraints that govern all law enforcement.

Finally, Sebastian County insists that as a matter of policy this Court should not recognize the right of crime victims to assert equal protection claims against prosecutors lest too many such claims arise in the future. This argument is belied by history and would, if accepted, eviscerate a quarter-century's worth of existing precedent affirming the standing of crime victims to sue law enforcement officers for class-based discrimination.

## ARGUMENT

### I. Sebastian County Misrepresents the Constitutional Injury, and Therefore the Constitutional Right, at Stake in this Case

Sebastian County flagrantly misstates the Constitutional claim at the core of this lawsuit. Its lawyers insist:

> The Petitioners' sole claim against the Respondents . . . is that the Constitutional rights of a minor, referred to as "H.P.," have been violated because the Respondents did not prosecute H.P.'s alleged molester for his alleged sexual assault(s) on H.P.

(Brief in Opposition, p. 4.) This is simply untrue. Petitioners' claim is, instead, that law enforcement officers violated H.P.'s right to equal protection of the laws by refusing to prosecute the man who

sexually assaulted her[1] because of class-based discrimination against H.P. – specifically, because H.P. is a victim of incest as opposed to the victim of an assault by a stranger. The difference between these two positions is crucial. It is also clearly established by existing case law.

As recently as 2000, the Ninth Circuit Court of Appeals – in a decision crucial to Petitioners' claims in this case – explicitly refuted the claim now offered by Sebastian County. In upholding a crime victim's standing to sue law enforcement officers for ignoring her case, to her harm, because she belonged to a disfavored class – exactly the posture of the instant matter – the Ninth Circuit emphasized that the legal injury was *not* the fact that her assailant was not arrested; it was the *discrimination* she suffered when law enforcement officers made a class-based decision not to pursue her assailant. *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000). *Macias* cannot reasonably be interpreted in any other way.

In fact, this Court has likewise stressed this exact distinction, stating in *Northeastern Florida*

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[1] Sebastian County attempts to soften the case against Belt by suggesting that he remains innocent because – thanks to Respondents' actions – he was never fully prosecuted. (Brief in Opposition, p. 3.) Of course, the facts of Belt's repeated sexual assaults on his young daughter, including the documented genital and anal injuries they caused, are detailed in the complaint and must be assumed true for the purpose of this appeal, following a dismissal under Rule 12(b). Indeed, a jury found Belt liable for battery and outrage as a result of the overwhelming evidence.

*Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586, 597 (1993) that "[t]he 'injury in fact' in an equal protection case . . . ***is the denial of equal treatment***." [Emphasis added.] The point was made still earlier in *Turner v. Fouche*, 396 U.S. 346, 362, 90 S. Ct. 532, 541, 24 L. Ed. 2d 567, 579-80 (1970). Again, no reader of these holdings could fail to see that class-based *discrimination* – not non-prosecution – is the injury at stake in the case at bar, and that this injury establishes the Petitioners' standing to sue the law enforcement officers who discriminated against H.P.

The absurdity of Sebastian County's argument may be illustrated by an analogy to almost any equal-protection case on record. For example, if Sebastian County were correct, the African-American plaintiffs in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), were not complaining of discrimination by state actors that violated their Fourteenth Amendment right to equality in education; according to Sebastian County, they were merely asserting a Constitutional right to go to school!

Sebastian County's pretense that Petitioners herein cannot sue state law enforcement officers under the Fourteenth Amendment for *their* discriminatory actions fares no better.[2] The

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[2] Notably, before the District Court, Respondents took the position that they had no discriminatory policy; clearly, they

standing of crime victims to sue law enforcement officers who ignore or slight their cases due to class-based discrimination is, in fact, well settled. Besides *Estate of Macias v. Ihde, supra*, precedents include: *Navarro v. Block*, 72 F.3d 712, 715-17 (9th Cir. 1995); *Myers v. County of Orange*, 157 F.3d 66, 74-75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49; and *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984).

*Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49, is worth particular attention, for in that case the Second Circuit Court of Appeals upheld the standing of an alleged crime victim to challenge a *prosecutorial policy* in an equal-protection suit against a county – a posture exactly parallel to Petitioners' claims against Sebastian County herein.

Sebastian County concedes that the plaintiff in *Myers* was, like H.P. in this case, a crime victim. (Brief in Opposition, p. 14.) This completes the symmetry between that case and the instant suit and flatly disproves Sebastian County's suggestion that discrimination in prosecutorial policy never gives victims standing to sue under the Equal Protection clause.

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are now forced to concede that for the purpose of this appeal the existence of such a policy must be assumed.

Due to the importance of its holding, the basic facts in *Myers* are worth summarizing. The plaintiff in that case reported to law enforcement that two people had attacked him; unknown to him, the alleged attackers had already called to make a complaint against *him*. Plaintiff's alleged assailants were never prosecuted. The plaintiff then brought an equal-protection action against the county that directed the local prosecutors, alleging that the county had promulgated a prosecutorial policy that dealt with criminal complaints on a first-come, first-serve basis, and that this policy violated his right to equal protection of state law. In upholding his standing to sue (157 F.3d at 74-75), the Second Circuit plainly recognized what Sebastian County now denies: that crime victims have standing to challenge prosecutorial policy that discriminates against a disfavored class to which the victims belong. *Myers* therefore completely disposes of Sebastian County's argument.

It is undisputed that, ***in the absence of class-based discrimination by law enforcement officers*** as in this case, a crime victim lacks standing merely to demand the prosecution of an alleged criminal. Yet that is all, as Sebastian County concedes, that the cases it cites actually hold. (Brief in Opposition, pp. 8-9.) Not one of those cases discusses an equal-protection challenge to discrimination by state actors – the essence of the instant case. (One of them, *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973), even stresses the absence of any consideration of equal protection. *Id.*, 410 U.S. at

615, 616, n. 1.) Sebastian County utterly ignores the case law that explicitly distinguishes between such a situation (in which a victim lacks standing against law enforcement officers) and a case that does arise from class-based discrimination by law enforcement officers (in which a victim *does* have such standing). *Thurman*, 595 F. Supp. at 1527-28; *Estate of Macias*, 157 F.3d at 1028.

Sebastian County's insistence that Petitioners claim standing based "solely" on the non-prosecution of Chad Belt brazenly misrepresents Petitioners' position and, more importantly, the relevant law.

## II. Sebastian County Impermissibly Denies that Prosecutors Are Law Enforcement Officers Involved in Providing Protection to the Public

Sebastian County just as flagrantly ignores the law when it claims that the right of crime victims to sue law enforcement officers for their class-based discrimination does not extend to suits against prosecutors. According to Sebastian County's unique view of law enforcement, prosecutors are not law enforcement officers, and are not involved in "protective services," because the "[p]rosecution of a criminal offender . . . is not a 'protective service' provided to other citizens by the police." (Brief in Opposition, p. 15.) Sebastian County presents absolutely no case law in support of this astonishing premise -- and there is none. Indeed, *Thurman v. City of Torrington* – the progenitor of

this entire line of cases – articulated its holding in terms that apply to *all* law enforcement officers, regardless of type or title:

> ***It is well settled that the equal protection clause is applicable . . . to discriminatory governmental action in administration and enforcement of the law.***

595 F. Supp. at 1527-28 [emphasis added]. Given this broad and unequivocal language, the onus is on Sebastian County to distinguish – if it can – between prosecutors and other law enforcement officers in the context of the state's obligation to provide equal protection of its criminal laws to all classes of citizens. Sebastian County cannot possibly do so.

First, there is ample case law establishing that prosecutors *are* law enforcement officials – indeed, an integral part of the state's "police power." *See In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir. 1997), *as amended on denial of rehearing, cert. denied*, 118 S. Ct. 2367, 141 L. Ed. 2d 736; *Hillis Motors, Inc. v. Hawaii Auto. Dealers Assn.*, 997 F.2d 581, 591 (9th Cir. 1993), *citing In re Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162, 102 S. Ct. 1035, 71 L. Ed. 2d 318. It obviously follows that prosecutors are bound by the same Constitutional constraints that govern other law enforcement

officers – including the Equal Protection clause. There is not a single case that suggests otherwise.

Second, the holding of *Myers v. County of Orange, supra* – a case actually cited by Sebastian County – demonstrates unmistakably that a victim's right to sue law enforcement officers extends to prosecutorial policies as well as to police conduct.

Third, Sebastian County's argument makes no sense: if prosecutors are not law enforcement officers, what are they? If they do not participate in the "protective service" offered by law enforcement, what is it they do for their communities? If prosecuting an offender is not part of protecting society, why is arresting the offender? Sebastian County offers no answer to these questions – and no answer exists. In truth, law enforcement without prosecutors would make no more sense than building half a bridge.

## III. Sebastian County Presents a "Policy" Argument that Would Eviscerate Existing Equal Protection Law

Finally, Sebastian County suggests that even though Petitioners are logically entitled to vindicate their Fourteenth Amendment rights against prosecutors – just as they would be against any other law enforcement officers – this Court should deny them that Constitutional right as a matter of policy. Sebastian County worries out loud about the "practical problem" posed by applying the

Equal Protection clause to law enforcement officers' discrimination against incest victims like H.P.:

> [I]f "alleged" crime victims were allowed to sue prosecutors under the equal protection clause [for class-based discrimination against the victim] . . . a torrent of litigation . . . would inevitably follow. . . . [T]he string of cases in exactly the same procedural posture would no doubt go on for pages.

(Brief in Opposition, p. 6.) Sebastian County's cynical "concern" is illusory and hypocritical.

First, there is no evidence that a flood of prospective litigation waits on the outcome of this case. Quite the contrary. To begin with, such litigation could only arise if prosecutors violate well-established equal protection principles. Besides, federal case law established crime victims' right to sue law enforcement officers for class-based discrimination fully twenty-five years ago. Yet no one could claim today that *Thurman v. City of Torrington* and its progeny have unleashed a "torrent" of cases on the federal courts in all that time. Nor has anyone before Sebastian County had the audacity to claim that, even if some similar cases were to follow this one,[3] the federal courts

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[3] Sebastian County falsely asserts that "anyone can be an alleged victim, merely by saying that they are one." (Brief in Opposition, p. 7, n. 2.) In reality, there is nothing automatic about defining a disfavored class for equal protection purposes – in this case, Petitioners have set forth considerable evidence of the discrimination involved – and the

would rather have lighter dockets than a Constitutional criminal justice system. Neither "concern" is grounded in the realities of justice. The actual consequence of the holding in *Thurman* was improved law enforcement procedure; the only likely effect of a holding in favor of Petitioners in this case is a similar improvement in the conduct of any prosecutors' offices that have hitherto discriminated against the victims of incestuous assaults. Few will agree with Sebastian County that such a prospect should trouble the federal courts.

Second, the "policy" suggested by Sebastian County defies logic. It would create a special immunity from the Equal Protection clause reserved solely for prosecutors and explicitly excluding all other law enforcement officers. It would set prosecutors, and only prosecutors, above the Equal Protection clause. At the same time the federal courts require all other law enforcement officers to dispense criminal justice equally to all classes of victims, this "policy" would license the most egregious and overt discrimination against the members of any class, so long as it happened to be committed by prosecutors. Sebastian County would have this Court permit prosecutors to refuse to pursue any crime at all, solely thanks to the race, religion or gender of the crime victim – or, as in this case, her status as a victim of incest. There

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detailed complaint also includes overwhelming evidence of Belt's repeated assaults upon H.P.

is no conceivable justification for embracing such an approach.

Third, setting prosecutors above the Equal Protection clause would inevitably undermine the hard-won rights of crime victims to demand equal justice from other law enforcement officers. Though police are under a "statutorily imposed duty to enforce the laws equally and fairly" (*Smith v. Ross*, 482 F.2d 33, 36 (6th Cir. 1973)), that "duty" would erode to nothing if discrimination against this or that class of victims could be freely shifted to the next rung of the law enforcement apparatus. Was the broad and emphatic language of *Thurman* and *Estate of Macias* only supposed to mean that while police must conduct their investigations and make their arrests in conformity with the Constitution, prosecutors may discriminate as much as they like against any class of victims they choose? Such a rule would eviscerate the extensive federal case law – stretching back twenty-five years – that guarantees crime victims the right to nondiscriminatory handling of their cases by law enforcement officers. Surely such a result cannot be justified.

## CONCLUSION

That Sebastian County's only objections to the arguments made by Petitioners in seeking certiorari are so plainly unfounded – indeed, are directly contrary to law – underscores the rightness and the urgency of Petitioners' plea for this Court's intervention. Petitioners have already asked this

Court to protect a quarter-century's worth of precedents ensuring the equal protection rights of all crime victims. In light of Sebastian County's Brief in Opposition, this Court's action is even more plainly required to protect the rights of crime victims from evisceration by public officials. This Court should make clear that 1) a violation of equal protection rights by prosecutors is a Constitutional injury, 2) prosecutors are law enforcement officers, and 3) federal courts are the proper venue to redress constitutional violations such as the egregious actions of the prosecutors in this case.

Respectfully submitted,

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